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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 526**

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**ADELL H. SHERBERT, APPELLANT,**

**vs.**

**CHARLIE V. VERNER, ET AL., AS MEMBERS OF  
SOUTH CAROLINA EMPLOYMENT SECURITY  
COMMISSION AND SPARTAN MILLS.**

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**APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA**

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**FILED OCTOBER 15, 1962**

**JURISDICTION NOTED DECEMBER 17, 1962**

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[fol. A]

**IN THE SUPREME COURT OF  
THE STATE OF SOUTH CAROLINA**

Appeal from Spartanburg County.

Honorable J. Woodrow Lewis, Judge.

ADELL H. SHERBERT, Appellant,  
against

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY,  
SR., as members of South Carolina Employment Security  
Commission and SPARTAN MILLS, Respondents.

**Transcript of Record**

[fol. 1]

**IN SUPREME COURT OF SOUTH CAROLINA**

**STATEMENT**

This is an appeal from a Decree of the Court of Common Pleas for Spartanburg County affirming a decision of the South Carolina Employment Security Commission.

The legal and factual issues involved in the instant case are identical with those involved in the case of *Sally W. Lloyd v. Charlie V. Verner et al.* Both cases were argued at the same time before Judge J. Woodrow Lewis. Similar Decrees were issued in both cases. The parties in both cases are represented by the same counsel. The Petitioners in both cases have appealed to this Court on the same issues. In order to avoid duplication of appeals, it has been agreed by and between all the parties to the *Lloyd* case that the decision of this Court in the instant case shall control and be binding in the *Sally W. Lloyd* case.

Appellant had been employed by Spartan Mills, Beaumont Division, for approximately thirty-five years. Immediately prior to June 5, 1959, she was working as a spool tender, Monday through Friday, on the first shift and her

hours were from 7 a.m. until 3 p.m. On June 5, 1959, she was notified by her employer that, commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although the employer's plant was operating on that day. Prior to June 5, 1959, Saturday work in employer's mill was on a voluntary basis, and Appellant had not worked at any time between sundown on Friday and sundown on Saturday, after she became a member of the Seventh Day Adventist Church. After she had failed to report for work for six successive Saturdays, she was discharged on July 27, 1959, because of her refusal to work as instructed. The reason given by her for refusing to work on Saturday, as directed by the employer, was that for nearly two years prior to her discharge she had been [fol. 2] a member of the Seventh Day Adventist Church, and that it was the teaching of her Church that the Sabbath Day begins at sundown Friday and ends at sundown Saturday, during which time she should not perform work or labor of any kind. She had applied for work at three other textile plants in the Spartanburg area, but had been unable to find employment since these plants and practically all of the other textile plants in that area operate six days a week, including Saturday. Appellant, on account of her religious belief, as a member of the Seventh Day Adventist Church, would not accept employment requiring work between sundown on Friday and sundown on Saturday. The first shift of the employer's operations included work on Saturday and the second and third shifts likewise included work on Saturday. Appellant, therefore, refused to work for the employer because of her religious belief.

On July 29, 1959, Appellant filed an additional claim for unemployment compensation benefits, which claim was contested by the employer. A Claims Examiner of the Commission issued a determination holding that the claimant had been discharged for misconduct connected with her work, and that she was unavailable for work and, therefore, ineligible for benefits.

Thereupon, the Appellant appealed from this determination to the Appeal Tribunal of the Commission. After a hearing, at which the testimony of the Appellant and her witness was taken, the Appeal Tribunal filed a decision affirming the determination of the Claims Examiner.

Appellant appealed to the Commission from the decision of the Appeal Tribunal. After a hearing, at which the Appellant was represented, the Commission, on December [fol. 3] 18, 1959, issued its decision affirming in all respects the decision of the Appeal Tribunal.

On January 5, 1960, Appellant commenced an action in the Court of Common Pleas for Spartanburg County for the purpose of obtaining judicial review of the decision of the Commission. The Commission and the Employer duly filed their respective Answers, and the Commission, as required by law, certified and filed with the Court all documents, papers and a transcript of the testimony taken in the case.

The case was heard before The Honorable J. Woodrow Lewis, Presiding Judge of the Seventh Circuit, on March 29, 1960, at which time arguments of counsel were heard. Thereafter, by Decree dated June 27, 1960, Judge Lewis affirmed the decision of the Commission holding that a disqualification had been properly imposed upon Appellant and that, because of the restrictions which she had placed upon her availability for employment, she was unavailable for work within the contemplation of the South Carolina Unemployment Compensation Law.

Appellant gave timely Notice of Intention to Appeal to the Supreme Court. The points made by Appellant's exceptions to Judge Lewis' Decree are in substance those made by Appellant in the proceedings below.

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#### BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

#### ADDITIONAL CLAIM FILED BY APPELLANT AND DETERMINATION OF THE CLAIMS EXAMINER

Additional claim filed by Appellant and the determination of the Claims Examiner are as follows:

#### Additional Claim

1. Claimant's name Adell H. Sherbert; 2. SSN 242-10-3181-B-3; 3. Home Address 639 Southern St., Spartanburg,

[fol. 4] S. C.; 4. Local Office & L. O. or I. P. No. Spartanburg 42; 5. Date this claim filed 7-29-59; 6. Effective date 7-28-59; 7. I was separated 7-27-59 from my last employer for the following reason: Discharged; 8. Last employer, Spartan Mill, Beaumont Mill, P. O. Drawer 690, Spartanburg, S. C.

Explanation: Mr. "Mitch" Allen, Spinning Room overseer said he would have to lay me off due to fact that I could not work on Saturday due to my religion—7th Day Adventist.

9. I received dismissal wages, No; 10. Location of last job Spartanburg; 11. I was working on the following shift when separated: First; 12. I hereby register for work and file a claim for benefits. I am unemployed. Able to work and available for work and will accept any suitable work offered on the following shift or shifts: First.

13. Claimant's Signature /s/ Adell H. Sherbert.

14. DETERMINATION:

Date: 9-4-59.

Claimant is not available for work and is therefore ineligible; Claimant disqualified (5) weeks for 7-28-59 to 9-1-59 for: Discharged for misconduct connected with most recent work.

Benefit year ends 12-21-59; Weekly benefit Amount \$26.00; Explanation The claimant was discharged for unexcused absences from work. (B) The claimant is a Seventh Day Adventist and is not willing to work on Saturday. Since she is not available for full-time work because of her religious belief, she is not entitled to benefits. A Court's decision has ruled that a claimant must be available for work during the regular work week observed in the industry and area in which he has worked. 15. Examiner /s/ [fol. 5] Marion H. King; 16. Employers for whom claimant has worked since last filing a claim: (list most recent one on line A); A. Same as Item 8; Dates: From 1-58 to xxx; Amount paid \$208.00; 17. Remarks by claimstaker; C.



states she has worked at Beaumont 35 years and has been a Seventh Day Adventist for past two years--not working on Saturday.

18. Claimstaker's Signature /s/ C. Huskey.  
South Carolina Employment Security Commission, Box  
995, Columbia, S. C.

BEFORE SOUTH CAROLINA EMPLOYMENT  
SECURITY COMMISSION

REPORT OF EMPLOYER ON CAUSE OF APPELLANT'S  
SEPARATION—August 17, 1959

On August 17, 1959; the employer reported the cause of Appellant's separation by letter from Henry M. Davis, Personnel Manager, to South Carolina Employment Security Commission dated August 17, 1959.

Spartan Mills, Beaumont Division, Post Office Box  
690, Spartanburg, S. C.

August 17, 1959

W. L. Montgomery, Pres. & Treas.

S. C. Employment Security Commission  
P. O. Box 995  
Columbia, S. C.

Re: Adell H. Sherbert  
248-10-3181 B 3

Gentlemen:

From World War II until June 6th, 1959, our Saturday work was on a voluntary basis. In as much as most textile plants require Saturday work when scheduled, we felt that our work must run as needed. Therefore, a notice to this [fol. 6] effect was posted in the mill on June 5th. Realizing that the Claimant had a problem, we gave her an extra step in our disciplinary set-up to be sure she was informed of all the circumstances.

After being out for six (6) Saturdays she was terminated in accordance with our posted company policy for being out unexcused absence.

Not once, did her Overseer talk to her as to her religious beliefs but as to her being at work when scheduled.

Mrs. Sherbert, during her last employment, was employed 8-1938 and terminated 7-30-59.

Sincerely,

/s/ Henry M. Davis, Personnel Manager.

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

**Transcript of Testimony**

Date of Hearing: October 2, 1959.

Place of Hearing: S. C. State Employment Service,  
Spartanburg, S. C.

**APPEARANCES:**

For Claimant: Claimant, Witness, and represented by Mr. James O. Cobb, Jr., Attorney, 721 Law Bldg., Charlotte, N. C.

For Employer: No Appearances.

This is Appeal 28,800 in the case of Mrs. Adell H. Sherbert, 639 Southern Street, Spartanburg, S. C.; SS No. 248-10-3181. The liable employer is Spartan Mills, Beaumont, Division, Box 690, Spartanburg, S. C. This hearing is being held on October 2 at Spartanburg before R. N. Sealy, Appeals Referee for the S. C. Employment Security Commission. The claimant appealed on September 9 from a claims examiner's determination dated September 4 whereby she was disqualified for five weeks from July 28 [fol. 7] to September 1, 1959 for misconduct connected with work upon the finding that she was discharged for unexcused absences. She was also held unavailable for work and therefore ineligible for benefits as of July 28, the effective date of an additional claim on the ground that she is not available for the regular work week observed in the industry and area in which she has worked.

The issues in this case are (1) whether or not claimant was separated under circumstances warranting a disqualification and (2) whether or not claimant is and has been available within the meaning of the law as of July 28, 1959.

The claimant, Mrs. Sherbert, is present and has two witnesses, Mrs. Sally Lloyd, who was a former fellow employee or co-worker, and also Dr. Harold Moody.

I'm going to ask Mr. Cobb at this time to explain exactly who the witness, Dr. Harold Moody, is. Mr. Cobb.

By Mr. James O. Cobb, Jr.

Attorney for Claimant:

Dr. Harold Moody is a practicing physician in Spartanburg, South Carolina, is a member of the Seventh Day Adventist Church in Spartanburg and is the duly elected medical advisor for the Carolinas Conference Association of Seventh Day Adventist League (?), which organization is the official body of the Seventh Day Adventist Church for North and South Carolina. In addition to his official connection with the organization which is the parent organization for the Seventh Day Adventist Church activities throughout the Carolinas, Dr. Moody is an elder in the Spartanburg Seventh Day Adventist Church.

By Mr. Sealy:

The claimant will be represented by two attorneys, Mr. Frank Lyles, P. O. Box 426, Spartanburg, S. C., and Mr. [fol. 8] James Cobb, 721 Law Building, Charlotte, N. C. Now, these two attorneys have requested that all papers in connection with this case be sent to each of their offices—copies to each of their offices, one at Spartanburg and one at Charlotte.

Now, you people understand that this testimony has to be taken under oath, so will you please—the three witnesses—raise your right hands?

Claimant and witnesses sworn. Claimant testifying.

## TESTIMONY OF ADELL H. SHERBERT

Q. What is your age at the present time, please, ma'am?

A. Fifty-seven.

Q. Are you in good physical condition?

A. Yes, sir, as far as I know.

Q. In other words, would you be able to work a full 40-hour week or could you still handle the job?

A. Yes, sir.

Q. In fact, I believe you been down there about—what? About 35 years?

A. Thirty-five years.

Q. Thirty-five years. I believe I saw that somewhere.

Who was your last employer?

A. Beaumont Plant.

Q. I believe that's called Spartan Mills. All right. And what type of work did you do down there, please, ma'am?

A. Winder-tender. Yarn winder.

Q. Yarn winder. All right.

A. Spool tender.

Q. Spool tender. Is that what it is? All right. I can change that. What shift did you work on?

A. First.

Q. And what are those hours?

A. From 7 to 3.

[fol. 9] Q. And how many days a week was the mill operating when you left there?

A. Six days a week.

Q. Now, as I understand it, before that they used to operate on a 5-day proposition. Do you recall the date, Mrs. Sherbert, that the mill started working the six days a week?

A. Well, I don't remember.

Q. Mrs. Sherbert, let me ask the question in this manner. When did the employer first demand that you work on Saturday?

A. Well, I don't recall the exact day.

Q. Was it sometime in June?

A. June, yes, sir.

Q. Now, just for the record, the employer wrote in that it was actually on June 5, so that's about as close as we can

get to it. All right, now. I believe that the record shows you've been working down there for close to 35 years, is that about right? And the last date you worked was June twenty—was it June 27—July 27, pardon me, July 27. That was on a Monday?

A. That's correct.

Q. Was that actually the last day? Were you separated on that same day, or was it later on that week that you actually were separated?

A. Was separated on that same day.

Q. Same day. That's July 27. Now, who was it that talked with you on the day of the separation?

A. Mr. Mitch Allen.

Q. Mr. Allen, and what is his title?

A. Well, he just told me—

Q. I mean, what is his title? Pardon me. What is his job down there?

A. Oh, he's an overseer in the spinning room.

[fol. 10] Q. Now, just what did he actually tell you as close as you can get to it—just in your own words.

A. Well, he just said he would have to get shut of me because I wouldn't come in on Saturday to work and that he was sorry that it had to happen like this, but it just had to happen like this so I was just out.

Q. Now, how many Saturdays—can you recall how many Saturdays that you had to stay out after he demanded—this man, the personnel manager, said six Saturdays from the time that they demanded you to go in.

A. Several Saturdays.

Q. Now, Mrs. Sherbert, first, did you ever go back down there to talk to these same people about work?

A. No, sir, I didn't.

Q. Well, have you tried anywhere else to get work?

A. Yes, sir.

Q. Now, would you give us the names of those places—some of the places that you've been to?

A. Saxton. Arkwright. Clifton.

Q. Now, do these places there, do they work just a 5-day week?

A. Six days a week they told me.

Q. And what type of work did you ask them for?



A. Just like I was at Beaumont.

Q. Well, now, if those places worked 6 days you wouldn't be in much better shape there, would you?

A. No, sir, I wouldn't.

Q. Well, I checked up with the Employment Service here, and they report that most of the textile plants operate on a 6-day basis in this area, and, of course, that all second and 3rd shift plants which, as I understand, a new person would have—you know, changing would have to go on. You can't just start out on the first shift. You have to start on [fol. 11] the third and all of those run on into Saturdays, you see. And now, just for the record, what days and hours would you be available for, please, ma'am?

A. Well, it would run into my Sabbath if I worked 40 hours a week anywhere, if I worked from Monday to Saturday which would be six days, and my Sabbath starts Friday night and ends Saturday night at sundown.

Q. It's from sundown Friday to sundown Saturday. All right. And, of course, you would not be interested in taking work that required you to work between those times?

A. No, sir.

Q. I mean you would not be interested in working on that—

A. No, sir.

Q. On your Sabbath day. Of course, I don't know if any of the plants work on Sunday. Now, this is the Referee. The employer—it's well after the scheduled hearing time and the employer has made no appearance or sent any witnesses up until now, so we are continuing with the hearing.

By Mr. James O. Cobb.

Attorney for Claimant:

Q. Mrs. Sherbert, of what church are you a member?

A. The Seventh Day Adventist.

Q. Do you know what—first, what view does your church hold with respect to working on the Sabbath?

A. They just don't hold with it at all. I mean they just don't believe in it because it's not right.

Q. And your Sabbath is from sundown Friday until sundown Saturday?

A. Yes, sir.

[fol. 12] Q. During the many years you were employed at Spartan were you ever reprimanded for misconduct on the job?

A. No, sir.

Q. During the many years you were employed at Spartan were you ever laid off for any sort of misconduct?

A. No, sir.

Q. Was your dismissal July of 1959 solely because of your refusal to work on the Sabbath?

A. Yes, sir.

Q. Did you advise your employer prior to the time that you were discharged of the reason for your refusal to work on your Sabbath?

A. Yes, sir, I did. I told him that the Lord had revealed it to me that it was the Sabbath—Saturday was the Sabbath, and I would not work on the Sabbath and that I wouldn't, I just couldn't work.

Q. And were your unexcused and unexplained absences from work due to your observance of your Sabbath?

A. Yes, sir.

Q. Mrs. Sherbert, would you be willing to work in another mill so long as it did not require work on your Sabbath?

A. Yes, sir, I would.

Q. Would you be willing to go to work in another industry so long as the job was a decent job and so long as you were not required to work on your Sabbath?

A. That's right. I sure would.

Q. And your health is good enough for you to hold down any job that the average woman in her fifties could hold down?

A. Yes, sir.

[fol. 13] Q. You are able to read and write?

A. Yes, sir.

Q. Mrs. Sherbert, when did you become a member of the Seventh Day Adventist Church?

A. I became a member two years ago the 6th of this past August.

Q. And from the time—from the day that you became

a member of that church, how much work have you done on the Sabbath?

A. Not any.

---

DR. HAROLD MOODY testifying:

Q. Dr. Moody, were you present at the time that I gave your connection with the ~~Seventh Day Adventist Church~~ to the examiner, Mr. Sealy?

A. I was.

Q. And was the information given by me to Mr. Sealy correct?

A. Yes, sir.

Q. And Dr. Moody, you were sworn by Mr. Sealy before this examination?

A. I was.

Q. Dr. Moody, I wonder if you would be good enough to tell us whether or not you know how many members of the Seventh Day Adventist Church there are in Spartanburg—your best guess?

A. One hundred and fifty.

Q. And do you of your own knowledge know whether or not some, many, or all of those members are gainfully employed in the Spartanburg area?

A. To my knowledge, all are employed except these two. [fol. 14] Q. In other words, the members of your church, to your knowledge, have no particular difficulty in obtaining jobs?

A. No, sir.

Q. Do any members of your—do you know whether or not any members of your church work on the Seventh Day Adventist Sabbath?

A. No, sir. They do not.

Q. Would you tell us, please, very briefly the view of the Seventh Day Adventist Church, the doctrine of the Seventh Day Adventist Church with respect to the Sabbath and with respect to whether or not work is desirable, permissible, or forbidden on the Sabbath?

A. Believing in the authenticity of the inspired Scriptures and holding to a literal translation of these Scriptures, Seventh Day Adventists believe that the seventh day of the

week, Saturday, is the Sabbath of God, that it was instituted by God at creation, that it was kept by Jesus Christ while here on earth, that it was kept by his disciples, and that it will be kept in the new earth. Seventh Day Adventists do not believe in labor or common work of any type on the seventh day. According to the Scriptures, the day begins and ends at sunset. As a result of this, we do not work from the time the sun goes down until it goes down the following day.

Q. That would be from sunset Friday?

A. Yes, sir.

Q. Until sunset Saturday?

A. Yes, sir.

Q. As I understand the matter the serious question to be decided is whether or not Mrs. Sherbert is available for work. It appears to me that this question is covered by the 1952 Code of South Carolina, Title 68, Sections 113 and [fol. 15] 114. We note that Section 113 makes a worker otherwise eligible, eligible to receive benefits if he is, in accordance with subsection 3, able to work and is available for work. On the other hand, Section 114 contains the disqualification clauses, and in subsection 3 it is provided that a claimant becomes disqualified only by, among other things, failure to apply for available work when so directed by the employment office or the Commission or (b) to accept available suitable work when offered him by the employment office or the employer. We contend that the available suitable work must be construed in to Section 113. In addition, when determining whether or not work is suitable, Section 114, subsection 3 (a) provides that determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to, among other things, his morals, and we submit very seriously and strenuously that it would undermine Mrs. Sherbert's morals to require her to work on her Sabbath or be denied the benefits of unemployment compensation. This precise question has been before the North Carolina Supreme Court. We would like to enter into the record that *in re Miller*, 243 N. C. 509, 91 S. E. (2d) 241, was decided in favor of a claimant under circumstances and facts identical with Mrs. Sherbert. In addition, we feel that a denial of this claim would be an un-

constitutional infringement upon the religious liberty guaranteed by the United States Constitution and by the Constitution of South Carolina.

By Mr. Sealy:

Referee:

Q. Mrs. Sherbert, would you have anything further to testify to in this hearing?

[fol. 16] A. No more than I just want to keep my Sabbath. That's what I want to do. I want to please God instead of man.

Q. Thank you. Would the Attorneys have any further examination or information?

A. No, sir.

Q. Thank you. This hearing is closed.

#### BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

#### DECISION OF APPEAL TRIBUNAL—October 12, 1959

Claimant appealed on September 9, 1959, from a claims examiner's determination, dated September 4, 1959, whereby she was disqualified for five weeks from July 28, 1959, to September 1, 1959, for misconduct connected with work upon the finding that she was discharged for unexcused absences. She was also held unavailable for work and therefore ineligible for benefits as of July 28, 1959, the effective date of an additional claim, on the ground that she is not available for the regular work week observed in the industry and area in which she has worked.

Notice was furnished interested parties and a hearing was held on October 2, 1959, at Spartanburg, South Carolina. Claimant appeared, testified, presented witnesses who also testified and was represented by Counsel. No appearance was made in behalf of the employer.

The issues are (1) whether or not claimant was separated under circumstances warranting a disqualification, and (2) whether or not claimant is and has been available, within the meaning of the Law, as of July 28, 1959.



## FINDINGS OF FACT

Claimant, a spooler tender, had been employed for many years prior to her separation in July of 1959.

[fol. 17] Since August 6, 1958, she has been a member of the Seventh Day Adventists who believe that the Sabbath should be observed from sundown on Friday until sundown Saturday.

Around the first of June, 1959, the employer notified all employees that they would henceforth be required to work six days per week, Monday through Saturday. Prior to this notice Saturday work had been on a voluntary basis.

Claimant notified the employer that she would not work on Saturdays due to her religious inclinations. She was discharged for being absent without permission several Saturdays thereafter.

She named several textile employers to whom she had applied; however, these employers also operate on a six-day work week basis. She will not accept employment that will require her to work on Saturdays.

Practically all textile plants in this area operate six days per week.

## DECISION

Claimant remained on the job after the general notice that a six-day schedule had been adopted. She thereby became accountable although she protested her personal objections and advised that she would not work on Saturdays. She did not quit but she was absent several times without permission. Since she remained under the new conditions and failed to meet them, the employer terminated her in accord with policy and notice thereof.

Such separations are subject to some disqualification.

Eligibility requirements also include that a claimant must be available for work without limitation or restriction which would interfere with a reasonable chance of finding employment.

[fol. 18] Under the circumstances the Tribunal is of the opinion that claimant has so limited her chances of procur-

ing employment as to prevent her from meeting the test of availability.

R. N. Sealy, Appeal Tribunal for South Carolina  
Employment Security Commission.

Columbia, S. C.,

October 12, 1959.

/p/1/c

BEFORE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

DECISION OF COMMISSION

Appeal Tribunal Decision No. 59-A-1134, issued October 12, 1959, affirmed a claims examiner's determination that claimant had been discharged for misconduct connected with her work, for which a disqualification of five weeks was imposed, and that claimant was unavailable for work. Claimant appealed.

Notice of hearing was given the interested parties and the Commission has considered the appeal.

DECISION

Decision No. 59-A-1134 of the Appeal Tribunal is hereby affirmed.

Claimant stated on her additional claim that she was separated from employment because she could not work on Saturdays, she being a Seventh Day Adventist.

The employer reported that claimant was notified on June 5 that commencing June 6 she would be required to work on Saturdays and that after she had stayed out for six Saturdays her services were terminated on July 30, 1959, because of her unexcused absences. The employer also reported that claimant's last employment commenced on [fol. 19] August 8, 1938, and terminated on August 8, 1938, and terminated on July 30, 1959.

Claimant testified that she worked for this employer for about thirty-five years; that her work was that of a spool tender on the first shift and that her hours were from seven to three o'clock; that at the time of her separation the plant was operating six days a week; that some time in June her

employer notified her that she would be required to work on Saturdays but that she did not report for work on any Saturday between that date and July 27, 1959, because she had joined the Seventh Day Adventist Church; that she cannot work between sundown Friday and sundown Saturday since that is her church's Sabbath; that she was dismissed by her employer solely because of her refusal to work on Saturday; that she had applied for work at a number of other textile plants but that since they all operate six days a week, she would not be interested in working for any of them.

An official of the Seventh Day Adventist Church testified that there are one hundred and fifty members of his church in Spartanburg and that all of them except two are gainfully employed; that to his knowledge, members of his church have no particular difficulty in obtaining jobs; that the Sabbath of his church is from sunset Friday until sunset Saturday and that its members do not work on their Sabbath.

The employer did not appear at the hearing.

According to the testimony, claimant refused to work on Saturdays, although her employer's plant and all other textile plants in that area operate on that day. Because of her refusal to work as instructed, claimant was discharged. Under our law, a discharge under such circumstance requires the imposition of a disqualification. Furthermore, claimant testified that she could not and would not work [fol. 20] on Saturdays, although as stated above, her employer's plant and all other textile plants in that area operate on that day. The placing of such a limitation and restriction upon the type of work which she would accept prevented her from meeting the requirements of availability established under our law, which are that an unemployed individual seeking benefits must be available for regular full time work. The decision of the Referee is therefore affirmed.

South Carolina Employment Security Commission,  
 Charlie V. Verner, Chairman, Ed. H. Tatum, Vice-  
 Chairman, Rob't. S. Galloway, Sr., Commissioner.

Date of Hearing: December 16, 1959.

Decision Mailed: December 18, 1959.

## IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

## PETITION OF APPELLANT

The Petition of Appellant, filed in the Court of Common Pleas for Spartanburg County (to which was attached a Summons), is as follows:

*Petitioner alleges:*

1. That she is a resident of the County of Spartanburg, State of South Carolina.

2. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are the duly qualified and acting members of the South Carolina Employment Security Commission.

3. That the Respondent, Spartan Mills, is a Corporation with its principal place of business in Spartanburg County, South Carolina.

[fol. 21] 4. That for approximately thirty-five (35) years preceeding July, 1959, Petitioner was in employed by Beaumont Mill which is owned and operated by the Respondent, Spartan Mills, as Spartan Mills Beaumont Division.

5. That in the month of August, 1957, Petitioner became a member of the Seventh Day Adyentist Church and she has been a member of that Church continuously since that time; that the Seventh Day Adventist Church observes as its Sabbath the period from sundown each Friday until sundown each Saturday; that it is a violation of the Church Law to pursue gainful employment on the Sabbath; that specifically this Petitioner has held a firm conviction that it would be immoral and a violation of the laws of God for her to pursue gainful employment during the period commencing sundown Friday and ending sundown Saturday.

6. That since she became a member of the Seventh Day Adventist Church in August, 1957, Petitioner has refused to work during any period which she and the members of her Church regard as the Sabbath.

7. That she has been a faithful and valuable employee of Beaumont Mills during her thirty-five years' service there until she was discharged in July, 1959, for the sole reason that she refused to violate her Sabbath; that from 1957 until June, 1959, the employer, Beaumont Mill, retained the Petitioner in its employment, although she was not available for work during the hours of her Sabbath each week and notwithstanding the fact that the mill was in operation frequently and for continuous periods on her Sabbath and it was necessary that some other person be secured to perform the customary duties of Petitioner when she was absent from work for the observance of her Sabbath.

[fol.22] 8. That Petitioner filed a claim for Unemployment Benefits under the provisions of the South Carolina Unemployment Compensation Law. The claim was denied respectively by the Claims Examiner; an Appeals Tribunal and the full Commission because the claimant was not "available" for work between sundown Friday and sundown Saturday.

Wherefore, by this Petition an Appeal is taken from the decision of the Commission, dated December 18, 1959, and this Court is asked to review and reverse the decision of the full Commission, as well as the decisions preliminary to it upon the following grounds:

(1) That it was error to hold that the claimant by refusing to work on her Sabbath has so limited her chances of procuring employment as to prevent her from meeting the requirement of availability under our Employment Security Law, the error being that the Employment Security Law does not require the claimant to be available for work at all hours of every day and night seven days each week.

(2) That it was error to hold that a person who holds a sincere religious belief that the Sabbath is from sundown Friday until sundown Saturday and that it is morally wrong to do any type work on the Sabbath must in spite of this belief be willing to work during



that time in order to be considered available for work under the South Carolina Employment Security Law.

(3) That it was error to hold that an "unemployed individual seeking benefits must be available for regular full-time employment", the error being that the holding is in conflict with the statute which only requires that the individual be available for suitable work.

[fol. 23] (4) That the holding of the Commission is in conflict with the South Carolina Constitution of 1895, Article I, Section 4, which guarantees the free exercise of religion in that the holding of the Commission imposes an economic penalty on the claimant thereby denying to her this constitutional guarantee.

(5) That the holding of the Commission is in conflict with the South Carolina Constitution of 1895, Article I, Section 5, which guarantees equal protection of the laws in that the Commission's holding would deny Petitioner the right to practice her religion if she is to enjoy the protection and the benefits accorded those who observe Sunday as their Sabbath.

(6) The holding of the Commission is in conflict with the first Amendment to the Constitution of the United States in that the holding denies Petitioner the free exercise of her religion.

(7) The holding of the Commission is in conflict with the first Amendment to the Constitution of the United States in that it denies Petitioner equal protection of the laws.

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#### IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

#### ANSWER AND RETURN OF COMMISSION

The Answer and Return of the Commission is as follows:

The Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., as members of South Carolina Employment Security Commission, by way of Answer and Return to the Petition of the Petitioner, respectfully show unto the Court and allege:

[Fol. 24]

*For a First Defense*

1. That they deny each and every allegation in said Petition contained.

*For a Second Defense*

1. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are now and were at the times hereinafter mentioned the duly constituted members of the South Carolina Employment Security Commission, an agency of the State of South Carolina, and, as such, charged with the duty and responsibility of administering the South Carolina Unemployment Compensation Law.

2. That on July 28, 1959, the Petitioner filed with said South Carolina Employment Security Commission, hereinafter referred to as the Commission, an additional claim for unemployment compensation benefits stating thereon that she had been discharged from her employment because she had refused to work on Saturday.

3. That on September 4, 1959, a claims examiner of the said Commission, pursuant to Section 68-153, Code of Laws, 1952, issued a determination holding that Petitioner had been separated under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

4. That Petitioner was promptly notified of said determination and that on September 9, 1959, she filed an appeal from said determination to the Appeal Tribunal of the Commission.

5. That on October 2, 1959, a hearing was held by an Appeals Referee, constituting an Appeal Tribunal, at which the testimony and the evidence in this case was received and recorded.

[Fol. 25] 6. That on October 12, 1959, the Appeal Tribunal issued its Decision No. 59-A-1134, whereby it affirmed the determination of the claims examiner and held that Peti-

tioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

7. That within the time allowed by law, the Petitioner appealed from the decision of the Appeal Tribunal to the Commission, and that these Respondents, constituting said Commission, heard said appeal on December 16, 1959.

8. That under date of December 18, 1959, said Commission rendered its decision in which it made findings of fact and conclusions of law and affirmed the decision of the Appeal Tribunal by finding that Petitioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

#### *For a Third Defense*

1. That the findings of fact by the Commission in this case are supported by the evidence, and that pursuant to Section 68-165, Code of Laws, 1952, such findings of fact are conclusive and not subject to review.

2. That the Commission has properly interpreted the pertinent provisions of the South Carolina Unemployment Compensation Law, and that its decision is in accord with the facts of this case and with the appropriate law applicable thereto.

WHEREFORE, these Respondents respectfully pray that the Petition of the Petitioner be dismissed, that the decision of the Commission be affirmed, and for such other and further relief as the Court may deem just and proper.

[Vol. 26]

## IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

## ANSWER AND RETURN OF THE EMPLOYER

The Answer and Return of Spartan Mills, the Employer, omitting caption and Attorney's signature, is as follows:

The Respondent, Spartan Mills, answering the Petition of the Petitioner, respectfully shows unto the Court:

*For a First Defense*

1. That it admits the allegations of Paragraphs 1, 2, 3, 4 and 8.

2. That as Respondent is informed and believes, the Petitioner was employed on or about August 8, 1938; as a Spooler-Tender by The Beaumont Manufacturing Company, the predecessor of Spartan Mills in the operation of its plant known as the Beaumont Division of Spartan Mills; that since 1949, she has continued to be employed by Spartan Mills until July 30, 1959; that up until the month of August, 1957, the Petitioner's work had been satisfactory, but at that time Petitioner became a member of the Seven Day Adventist Church and thereafter declined to work from sundown on Friday until sundown on Saturday, which made her unavailable for work on the second and third shifts on Friday while the mill was operating on a five-day schedule and unavailable for work on any shift on Saturday when the mill was operating on a six-day schedule; that during the period between August, 1957, and July 30, 1959, the Respondent made special effort to accommodate Petitioner by getting someone else to fill her job on occasions when she failed to report for work, and even made effort, without success, to obtain work for her elsewhere compatible with her desires and availability for work; that the business of the Beaumont Division of Spartan Mills [fol. 27] is manufacture of textile, forming a part of the textile industry in the Piedmont section of South Carolina which operates upon a three-shift basis and on a six-day work week when the demand for its products requires that schedule; that the demand for its products varies and in

periods of high demand, a six-day operation is normal in the industry and in the area in which the Beaumont plant is located; that on June 5, 1959, the Respondent posted a notice that Saturday work would be on a required basis, the same as any other work day when the employee's job was running and that no exceptions to this rule would be allowed; that after several warnings and layoffs for failure to report for work on Saturday after being notified, the Petitioner was terminated on July 30, 1959, under the Company's posted regulations dealing with unexcused absences.

3. Except as hereinabove admitted, each and every allegation in said petition is denied.

*For a Second Defense*

1. That the Respondents, Charlie V. Verner, Ed. H. Tatum and Rob't. S. Galloway, Sr., are now and were at the times hereinafter mentioned the duly constituted members of the South Carolina Employment Security Commission, an agency of the State of South Carolina, and as such, charged with the duty and responsibility of administering the South Carolina Unemployment Compensation Law.

2. That on July 28, 1959, the Petitioner filed with said South Carolina Employment Security Commission, hereinafter referred to as the Commission, an additional claim for unemployment compensation benefits stating thereon [fol. 28] that she had been discharged from her employment because she had refused to work on Saturday.

3. That on September 4, 1959, a claims examiner of the said Commission, pursuant to Sect on 68-153, Code of Laws, 1952, issued a determination holding that Petitioner had been separated under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

4. That Petitioner was promptly notified of said determination and that on September 9, 1959, she filed an appeal from said determination to the Appeal Tribunal of the Commission.



5. That on October 2, 1959, a hearing was held by an Appeals Referee, constituting an Appeal Tribunal, at which the testimony and the evidence in this case was received and recorded.

6. That on October 12, 1959, the Appeal Tribunal issued its Decision No. 59-A-1134, whereby it affirmed the determination of the claims examiner and held that Petitioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

7. That within the time allowed by law, the Petitioner appealed from the decision of the Appeal Tribunal to the Commission, and that these Respondents, constituting said Commission, heard said appeal on December 16, 1959.

8. That under date of December 18, 1959, said Commission rendered its decision in which it made findings of fact and conclusions of law and affirmed the decision of the Appeal Tribunal by finding that Petitioner had been discharged under disqualifying circumstances for which a disqualification of five weeks was imposed and that Petitioner was unavailable for work as of July 28, 1959.

#### *For a Third Defense*

1. That the findings of fact by the Commission in this case are supported by the evidence, and that pursuant to Section 68-165, Code of Laws, 1952, such findings of fact are conclusive and not subject to review.

2. That the Commission has properly interpreted the pertinent provisions of the South Carolina Unemployment Compensation Law, and that its decision is in accord with the facts of this cause and with the appropriate law applicable thereto.

WHEREFORE, the Respondent, Spartan Mills, respectfully prays that the Petition of the Petitioner be dismissed, that the decision of the Commission be affirmed, and for such other and further relief as the Court may deem just and proper.

## IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

## DECREE

The petitioner, hereinafter referred to as the claimant, instituted this action pursuant to Section 68-165, Code of Laws of South Carolina, 1952, seeking judicial review of a decision of the South Carolina Employment Security Commission in which it was held that a disqualification of five weeks had been properly imposed upon her and that because of her unavailability for work she was not entitled to unemployment benefits. The decision of the Commission affirmed the prior decision of the Appeal Tribunal which had, in turn, affirmed the initial determination of the Claims Examiner.

This case has been considered on the basis of the record made in the proceedings which culminated in the decision of the Commission and has been fully argued before me by [fol. 30] the General Counsel for the Commission and the attorneys for the claimant and the employer.

~~The essential facts are not in dispute.~~ Claimant had been employed by Spartan Mills, Beaumont Division, for more than thirty years. She was working as a spool tender on the first shift and her hours were from 7 a. m. to 3 p. m. On June 5, 1959, she was notified that commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although her employer's plant and all other textile plants in that area were operating on that day. After she had stayed out for six Saturdays, she was discharged because of her refusal to work as instructed. The reason given by her for refusing to work on Saturday was that she had joined the Seventh Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. She has applied for work at a number of other textile plants, but since they all operate six days a week she would not accept employment with any of them. Furthermore, she testified that on account of her religion she would accept work only on the first shift from Monday to Friday.

By this action, claimant seeks judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

The facts and the issues in the instant case are identical with those in the case of *Pierce W. Strange against the Commission*, which was heard and decided by Judge Joseph R. Moss, the Presiding Judge of the Court of Common Pleas for Greenville County.

In the *Strange* case, the claimant had been discharged by his employer because he refused to work on Saturday, giving as his reason therefor that he had joined the Seventh [fol. 31] Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. He had testified that he would not accept any job with his former employer or any other employer on a normal five-day week basis if he were told that the might be sometimes required to work on Saturdays. He also testified that his former employer was operating at that time, in part, on a six-day week basis and that other plants in the area, providing similar jobs, were likewise operating. The Commission had held in that case, as it did in the instant case, that the claimant had been discharged for misconduct connected with his work, for which a disqualification was imposed, and that he was unavailable for work as of the date upon which he had filed his claim for benefits.

The claimant, Pierce W. Strange, thereupon brought an action seeking judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

In passing upon the disqualification issue Judge Moss held as follows:

"Section 68-114 (1) and (2) authorizes the Commission in its discretion to impose a disqualification in any case where an employee leaves his work voluntarily without 'good cause' or is discharged for 'misconduct connected with his work'. The 'good cause', or the want of it, and the 'misconduct connected with the work' thus contemplated need not have any relation to censurable conduct. When the motivating reason for the termination of employment stems from considerations personal to the employee, the fact that the employee pursues the course which society would gen-

erally approve, does not necessarily mean that it amounts to 'good cause' or does not amount to 'misconduct connected [fol. 32] with work' within the contemplation of the Act. What is contemplated by the Act, insofar as a disqualification is concerned, is the protection of employees who become unemployed by reason of the particular employer's failure to provide the particular employee with continued job opportunities under reasonable conditions.

"Thus, the Supreme Court of South Carolina, in *Stone Manufacturing Company v. South Carolina Employment Security Commission*, 219 S. C. 239, 64 S. E. (2d) 644, quoting with approval from *San Shipbuilding & Drydock Company v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A. (2d) 254, said:

"A laudable motive for leaving employment and a 'good cause' within the meaning of the Act are entirely different things."

"In the *Stone Manufacturing Company* case, the claimant left her employment at the employer's plant at Columbia, South Carolina, when her husband, a member of the Armed Forces, was transferred from Fort Jackson, near Columbia, S. C., to Fort Bragg, near Fayetteville, N. C. Certainly the first duty of a wife is to be with her husband and to maintain a home for her family. Instead of criticizing her for discharging that duty, society would expect it of her. But while her reason for leaving was personally a good one, it was wholly unrelated to any failure upon the part of the employer to provide her with employment under reasonable conditions as he had in the past, and the Court held that her laudable motive nevertheless was not 'good cause' within the meaning of the Act.

"In this case, the claimant, during his more than twenty years of employment by the employer, had worked on Saturdays from time to time whenever Saturday work was necessary. His refusal to continue to work on Saturdays [fol. 33] as he had in the past did not arise out of anything connected with the employment, but solely by reason of the fact that he had become a member of the Seventh Day Adventist Church. His adherence to his new religious belief

is certainly not blameworthy or censorable, but his election to join that church was a matter personal to him, and arose in no respect out of his employment. Just as the wife who found it impossible to continue her employment because of the requirements of her duties to her husband, so the claimant here found it impossible to continue his employment as he had in the past because of the impact of his new religious beliefs. No one has suggested that the actions of the claimant in either case would not be approved by society in general, but in each case, the claimant chose to be faithful to a belief or duty entirely personal to him and inconsistent with his continued employment upon the same basis as theretofore."

Judge Moss thereupon held that the imposition of the disqualification was clearly required by the facts.

In my opinion the imposition of the disqualification in the instant case was likewise required by the facts. The decision of the Commission on that issue is therefore affirmed.

In passing upon the issue of availability, Judge Moss held as follows:

"It is contended by the claimant that since becoming a Seventh Day Adventist, he believes that the Sabbath should be celebrated from sundown on Friday until sundown on Saturday and that to require him to work within those hours would be offensive to his religious beliefs and would involve risk to his morals within the contemplation of Section 68-114 (3) (a). He was thus emphatic that he would not accept any job with his former employer or [fol. 34] anyone else if he were told that he might sometimes be required to work on Saturdays.

In imposing this restriction upon his availability, he seems clearly to have made himself totally unavailable for work in the textile industry in the Piedmont Section of South Carolina, for the record discloses, and the claimant concedes, that such work is, upon occasion, generally required by textile plants in that area. Indeed, the limitations imposed by the claimant would make him available for only four days a week for second shift operation, which normally starts at 4:00 o'clock in the afternoon and runs to midnight.

For a job on the second shift, the claimant would thus be available for work only on Mondays, Tuesdays, Wednesdays and Thursdays. By the limitations imposed by him, he would be unavailable on Fridays and Saturdays, and the laws of the State of South Carolina prohibit an employer in the textile industry from suffering or permitting anyone, with certain exceptions not here applicable, to work on Sunday. For job openings on any other shift, the claimant would be available, at the most, for work on Mondays through Fridays, inclusive, for he has made himself unavailable for work on Saturdays, and the statutory prohibition prevents his working on Sundays.

"As a practical matter, the Court must conclude under the circumstances that the claimant fails to meet the availability requirements of the law. \* \* \* The reason for the termination of his employment (his refusal to work on any job in which work on Saturdays might sometimes be required) prevents his acceptance of like work with any other employer in the area, and practically viewed, there is an absolute unavailability of the claimant for employment in the textile industry in this section."

[fol. 35] "Clearly the general purpose of the act was to mitigate the disastrous effects of involuntary unemployment, resulting from a failure of industry to provide sufficient employment opportunities. It was not intended to provide compensation for any person, who, because of considerations personal to him, became unavailable for employment when industry generally provided abundant job opportunities for the people in the area.

"Thus, the Supreme Court of South Carolina, in *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S. C. 37, 28 S. E. (2d) 535, held the claimant unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift, upon which she had been working, even though she was apparently available for employment on either the first or second shifts. The claimant in that case was a textile worker. She was the mother of four children. A relative took care of the young children during the hours of her employment. The relative became



unavailable for the care of the children and the claimant quit her employment and limited her availability for employment to the first or second shifts.

9 "The duty of the claimant in the *Judson Mills* case to take care of her young children is certainly paramount to any consideration in connection with her employment. But if the restrictions imposed by her upon her availability for employment led the Supreme Court of the State to conclude that she was unavailable for employment within the meaning of the Act, then clearly, the claimant in this case was unavailable for employment."

[fol. 36] "Since the claimant's restrictions upon his own availability for employment in the industry in which he was employed for over twenty years and in the locality in which he lived and worked, makes him unavailable for employment in that industry in that locality, it must be concluded that he is unavailable for employment within the meaning of the Act."

In my opinion, the restrictions which claimant in the instant case placed upon her availability for employment made her unavailable for employment within the contemplation of the South Carolina Unemployment Compensation Law. The decision of the Commission on that issue is therefore affirmed.

It is therefore ordered, adjudged and decreed that the decision of the South Carolina Employment Security Commission holding that a disqualification of five weeks had been properly imposed upon petitioner and that because of her unavailability for work she was not entitled to unemployment benefits be and the same is hereby affirmed. It is further ordered that the petition of the petitioner be dismissed with costs.

## IN COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

## NOTICE OF INTENTION TO APPEAL

Appellant gave due Notice of Intention to Appeal from the Decree of Judge Lewis and brings this appeal upon this record and the exceptions hereinafter printed.

## EXCEPTIONS

1. That it was error to hold that the claimant by refusing to work on her Sabbath has so limited her chances of procuring employment as to prevent her from meeting the requirement of availability under our Employment Security Law, the error being that the Employment Security Law does not require the claimant to be available for work [fol. 37] at all hours of every day and night seven days each week.

2. That it was error to hold that a person who holds a sincere religious belief that the Sabbath is from sundown Friday until sundown Saturday and that it is morally wrong to do any type work on the Sabbath must in spite of this belief be willing to work during that time in order to be considered available for work under the South Carolina Employment Security Law.

3. That it was error to hold that an "unemployed individual seeking benefits must be available for regular full-time employment," the error being that the holding is in conflict with the statute which only requires that the individual be available for suitable work.

4. That the Commission and the Court, in holding petitioner, because of her refusal based on religious considerations to work from sundown Friday to sundown Saturday, to be "disqualified" for benefits and "unavailable for employment" within the meaning of Sections 67-113 (4) (c), 68-114 (2) and 68-114 (3), erred in failing to hold that said Sections of the South Carolina Code of Laws, as construed and applied to the facts and the petitioner in this case, violate Article I, Section 4, of the South Carolina Constitution of 1895, which guarantees the free exercise of religion in that the holding of the Commission imposes an economic

penalty on the claimant because of her exercise of her religion.

5. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws, as construed and applied to the claimant in this case, violate the equal protection clause of the South Carolina Constitution of 1895, Article I, Section 5, in that the Commission's holding denies [fol. 38] to petitioner, in the practice of her religion, the protection of the benefits accorded those who observe Sunday as their Sabbath.

6. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws, as construed and applied to petitioner in this case, violate the guarantee of free exercise of religion contained in the First Amendment to the Constitution of the United States as absorbed into the Fourteenth Amendment to the Constitution of the United States.

7. That the Commission and the Court erred in failing to hold that Sections 68-113 (4) (c), 68-114 (2) and 68-114 (3) of the South Carolina Code of Laws violate the First Amendment to the Constitution of the United States as absorbed into the Fourteenth Amendment to the Constitution of the United States in that it denies petitioner, in the practice of her religion, the protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath.

8. That it was error to find that all other textile plants in the area were operating on Saturday, as the testimony shows only that most of the textile plants in the area were operating on Saturday.

9. That it was error to find that Appellant testified that she would accept work "only on the first shift" from Monday to Friday in that such finding is not supported by the record.

[fol. 41]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4819

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ADELL H. SHERBERT, Appellant.

v.

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CHARLIE V. VERNER, ED H. TATUM, ROBERT S. GALLOWAY, SR.,  
as members of SOUTH CAROLINA EMPLOYMENT SECURITY  
COMMISSION, and SPARTAN MILLS, Respondents.

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Appeal From Spartanburg County, J. Woodrow Lewis,  
Judge.

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Affirmed

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Lyles & Lyles, of Spartanburg, and Dockery, Ruff,  
Perry, Bond & Cobb, of Charlotte, North Carolina,  
for appellant.

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Jas. Julien Bush, of Columbia; Benjamin O. Johnson  
and Butler & Chapman, all of Spartanburg, for respon-  
dents.

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OPINION No. 17915—Filed May 17, 1962

Moss, A. J.: Adell H. Sherbert, the appellant herein, did, on July 29, 1959, file her claim with the South Carolina Employment Security Commission, one of the respondents herein, for unemployment compensation benefits under the "South Carolina Unemployment Compensation Law." Section 68-1, et seq., 1952 Code of Laws of South Carolina.

The appellant, a textile employee, had worked for Spartan Mills, Beaumont Division, a respondent herein, for approximately thirty-five years. Immediately prior to June 5, 1959, she was working as a spool tender Monday through Friday, on the first shift, and her hours were from 7:00 A. M. until 3:00 P. M. On June 5, 1959, she was notified by her employer that, commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although the employer's plant, and other textile plants in the area, were

operating on a six day basis, which included Saturday. Prior to June 5, 1959, Saturday work in Spartan Mills was on a voluntary basis and the appellant had not worked at any time between sundown Friday and sundown on Saturday after she became a member, on August 5, 1957, of the Seventh Day Adventist Church. The appellant failed to report for work on six successive Saturdays and she was discharged on July 27, 1959, because of her refusal to work on Saturdays. The reason given by the appellant for refusing to work on Saturdays was that for nearly two years prior to her discharge she had been a member of the Seventh Day Adventist Church and it was the teaching of her Church that the Sabbath begins at sundown Friday and ends at Sundown Saturday, during which time she should not perform work or labor of any kind. The appellant applied for work at three other textile plants in the Spartanburg area but had been unable to find employment since these plants and practically all of the other textile plants in the area operated six days a week, including Saturday. The first, second and third shifts of Spartan Mills included work on Saturday.

It appears that on September 4, 1959, a claims examiner of the Commission, pursuant to Sections 68-152-4 of the 1952 Code, issued a determination holding that the appellant had been separated from her employment because she was unavailable for work as of July 28, 1959, and imposed a disqualification of five weeks, thereby preventing her from receiving unemployment compensation benefits for said period. He further held that the appellant was not available for the regular work week observed by Spartan Mills and by the textile industry in the area in which she worked.

The claimant appealed from the initial determination of the claims examiner to the Appeal Tribunal of the Commission, and a hearing was held by an Appeals Referee pursuant to Section 68-160 of the Code, at which the testimony of the appellant and her witness was taken. On October 12, [fol. 42] 1959, the Appeal Tribunal affirmed the determination of the claims examiner and held that the appellant had been discharged under disqualifying circumstances because she was not available for work as of July 28, 1959.



Pursuant to Section 68-161 of the Code, and within the time allowed by law, the claimant appealed from the decision of the Appeal Tribunal to the Full Commission. This appeal was heard by said Commission on December 16, 1959 and, thereafter, on December 18, 1959, the Commission rendered its decision in which it made findings of fact and conclusions of law affirming the decision of the Appeal Tribunal.

The appellant commenced an action on January 5, 1960, in the Court of Common Pleas for Spartanburg County, for the purpose of obtaining a judicial review of the decision of the Commission. Section 68-165 of the Code. The case was heard by The Honorable J. Woodrów Lewis, Presiding Judge of the Seventh Circuit. Thereafter, by a decree dated June 27, 1960, Judge Lewis affirmed the decision of the Commission, holding that a disqualification had been properly imposed upon the appellant and that, because of the restrictions which she had placed upon her availability for employment, she was unavailable for work within the meaning of the South Carolina Unemployment Compensation Law. Timely notice of intention to appeal to this Court was given by the appellant.

The first question for determination is whether the appellant was able and available for work, under the facts here involved, within the contemplation of the South Carolina Unemployment Compensation Law, or was she discharged for misconduct connected with her work. The determination of this question involves consideration of the two sections of the Unemployment Compensation Law which prescribe the general rules of eligibility for unemployment compensation benefits. These are Sections 68-113, which provides for basic conditions which have to be met in order to qualify; and Section 68-114 enumerates a series of disqualifications.

Section 68-113 provides that:

"An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:



"(1) He has made a claim for benefits with respect to such week in accordance with such regulations as the Commission may prescribe;

"(2) He has registered for work, . . .

"(3) He is able to work and is available for work, . . ."

Section 68-114 provides:

"Any insured worker shall be ineligible for benefits:

"(1) Leaving work voluntarily. If the commission finds that he has left voluntarily without good cause his most recent work prior to filing a request for determination of insured status . . .

"(2) Discharge for misconduct. If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year. . . .

"(3) Failure to accept work. If the Commission finds that he has failed, without good cause; (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer. . . ."

At the 1955 session of the General Assembly of South Carolina, Section 68-114 was amended by adding to subdivision (3) thereof a subsection (a) (49 Stats. 490), the following:

[19143] "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health; safety and morals, . . .

It is a fundamental principle of statutory construction that statutes must be construed in the light of the evil they

seek to remedy and in the light of the conditions obtaining at the time of their enactment. *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, 204 S. C. 37, 28 S. E. (2d) 535.

The public policy and the purpose of the enactment of the Unemployment Compensation Law of this State is fully set forth in Section 68-36 of the 1952 Code and is declared to be as follows:

" \* \* \* economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. \* \* \* "

In the case of *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, supra, this Court adopted the decree of the lower Court, where with reference to the Unemployment Compensation Act, it was said:

"This statute was passed in 1936, at a time when this State, in common with the entire nation, was suffering from a prolonged depression which had resulted in industry laying off many workers, many of whom were left without the means of obtaining even the barest necessities of life. This unquestionably was the evil which the Legislature was seeking to remedy. Unemployment due to changes in personal conditions of the employee making it impossible for him to continue on his job had existed for many years, but there is no reason to believe that the evil resulting therefrom was employee, making it impossible for him to continue on

his job had existed for many years, but there is no reason to believe that the evil resulting therefrom was any more pronounced in 1936 than it had been prior to that time. I find nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances:

"It will be noted that one of the remedies proposed by the Legislature in its declaration of State policy was the encouragement of industry to provide more stable employment. In furtherance of this objective, the Act imposed upon the employer the entire burden of creating and maintaining a fund for the payment of unemployment benefits. . . ."

"The primary purpose of this provision would be greatly impaired, if not completely defeated, if benefits were paid to persons who became unemployed, not because the employer could no longer provide them with work but solely because of changes in their personal circumstances. I am constrained, therefore, to conclude that in order to be entitled to benefits under the Act the unemployed individual must be able to and available for the work which he or she has been doing."

It is obvious, therefore, that the fundamental purpose of the Unemployment Compensation Law is to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment and not to provide unemployment compensation where work is available and the employee is able to work and is available for such work.

In *Stone Mfg. Co. v. South Carolina Employment Security Commission, et al.*, 219 S. C. 239, 64 S. E. (2d) 644, it was held that the term "involuntary unemployment" as [fol. 44.] used in the declaration of policy, "had reference to unemployment resulting from a failure of industry to provide stable employment," and that the statute was not intended "to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances." We quote from the *Stone* case, the following:

"The courts elsewhere generally recognize that the statute was enacted "for the benefit of persons unemployed through no fault of their own." *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A. (2d) 254, 259. And it has been held that the word 'fault' as used in the declaration of policy is not limited to something that is blameworthy, culpable or wrong. *Moulton v. Iowa Employment Security Commission*, 239 Iowa 1161, 34 N. W. (2d) 211. In *Walter Bledsoe Coal Co. v. Review Board of Employment Security Division*, 221 Ind. 16, 46 N. E. (2d) 477, 479, the court said: 'Appellees say that the word "fault" means "something worthy of censure". We cannot believe that the word as used in the statute was intended to have such a meaning. \* \* \* Thus "fault" must be construed as meaning failure or volition.'

In the case of *Hyman v. South Carolina Unemployment Security Commission, et al.*, 234 S. C. 369, 108 S. E. (2d) 554, this Court held that where a claimant files an application for unemployment compensation benefits, the burden is upon the claimant to show that he has met the benefit eligibility conditions. It was further held that findings of fact made by the Security Commission are conclusive and this Court will not review such findings except to determine whether there is any evidence to support such findings.

The Commission has found that all of the textile plants, including the Spartan Mills, operate six days per week. The six day work week schedule of Spartan Mills was put into effect on July 5, 1959. The appellant remained on her job after notice that such a schedule had been adopted requiring all employees to work six days per week, Monday through Saturday. The appellant did not quit her employment but was absent, without permission, for six Saturdays, and because thereof her employer had to employ a substitute to do her work on Saturdays.

The appellant testified that she was able to work but she was not available for work between sundown on Friday and sundown on Saturday because it conflicted with her religious belief as a member of the Seventh Day Adventist Church. She further testified that she would not accept any employ-

ment requiring work during this period of time. She further testified of making application to a number of other textile plants but since they all operated six days a week, she would not be interested in working in any of them. The appellant, being able to work, it must be determined whether she "is available for work" within the contemplation of the Unemployment Compensation Law.

The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market; which in this case is unrestricted availability for work.

The case of Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S. E. (2d) 524, was one in which unemployed miners, who were willing to work only three days per week, in obedience to labor union officers' directive, instead of five days per week, as was customary in mining industry, were held not available for work within the Unemployment Compensation Act of the State of Virginia, and hence were not eligible for unemployment benefits. We quote from the cited case; the following:

"As used in the statute, the words 'available for work' imply that in order that an unemployed individual may be eligible to receive benefits he must be willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions not usual and customary in that occupation but which he may desire because of his particular needs or circumstances. Stated conversely, if he is unwilling to accept work in his usual occupation for the usual and customary number of days or hours, or under the usual and customary conditions at or under which the trade [fol. 45] works, or if he restricts his offer or willingness to work to periods or conditions to fit his particular needs or circumstances, then he is not available for work within the meaning of the statute.

"The courts have universally held that a claimant who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions, not

usual and customary in the trade, is not available for work."

In 81 C. J. S., Social Security and Public Welfare, Section 204, at page 304, it is said:

"A claimant may render himself unavailable for work by imposing conditions and limitations as to his employment, so as to bar his recovery of unemployment compensation, since a willingness to be employed conditionally does not necessarily meet the test of availability. Accordingly, it has been held that a claimant who undertakes to limit or restrict his willingness to work to certain days, hours, types of work, or conditions, not usual in his occupation or trade, is not available for work."

The availability for work requirement has been said to be satisfied when an individual is willing, able, and ready to accept suitable work or employment, which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. *Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc.*, 197 Va. 816, 91 S. E. (2d) 642.

In the case of *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, supra, it was held that the claimant was unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift upon which she had been working. The claimant was a textile worker and the mother of four children. During her employment on the third shift a relative took care of her children and when such relative became unavailable for the care of the children the claimant quit her employment and limited her availability to either the first or second shifts. The lower Court and this Court concluded that the claimant was unavailable for employment within the meaning of the Unemployment Compensation Act and said there is "nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give



up his job solely because of a change in his personal circumstances."

In the case of *Hartsville Cotton Mill v. South Carolina Employment Security Commission*, 224 S. C. 407, 79 S. E. (2d) 381, the claimant, a textile worker, and the mother of young children, limited her availability for work to the second shift. She had previously worked on the third shift but had let her cook go and had no one with whom to leave her children. This Court approved an order of the lower Court which held that the claimant's unemployment did not result from the failure of her employer to provide stable employment, but arose out of a change in her domestic circumstances which rendered her unavailable for work. It must follow that while she is unavailable for work due to her own personal circumstances, she falls outside the class which the Act was intended to benefit."

In *Kuf v. Albers Super Markets, Inc., et al.*, 146 Ohio St. 522, 66 N. E. (2d) 643, app. dismd. 329 U. S. 669, 91 L. Ed. 590, 67 S. Ct. 86, reh. den. 329 U. S. 827, 91 L. Ed. 702, 67 S. Ct. 186, it appears that a claimant was employed as an order clerk and as a checker in a super market. His employment was terminated by his refusal to continue to perform the work assigned to him. He was referred to two companies, each of which was willing to employ him as a shipping clerk. However, each company refused to accept him for the reason that he refused to work on Saturday, which because of his religious beliefs, he observed as his Sabbath. He filed an application for unemployment compensation and benefits were disallowed because the facts established that the claimant was unavailable for work on any Saturday. The Supreme Court of Ohio affirmed the disallowance of unemployment benefits to the claimant, saying:

"The statute does not designate particular days of the week. It provides that in order to be entitled to benefits a claimant must be able to work and available for work in his usual trade or occupation, or in any [fol. 46] other trade or occupation for which he is reasonably fitted. Hence, he must be available for work on Saturday if this is required by his usual trade or occupation, as in this instance.

"Is this provision of the statute a violation of the constitutional right to religious freedom or the right to equal protection of the law? The plaintiff, like everyone else, is free to choose both his religion and his trade or occupation. If in making these voluntary choices he renders himself unavailable for work in his chosen trade or occupation or in any other for which he is reasonably fitted, he, like everyone else who fails to comply with the statutory requirement, is not entitled to unemployment benefits. Hence, the statute is not unconstitutional."

Here, the appellant attempted to limit or restrict her willingness to work to certain days and a certain shift, not usual in the textile industry in the Spartanburg area. She attached restrictions and conditions upon her continued employment with Spartan Mills because of her own particular circumstances and religious creed. It is implicit in the record that it is usual and customary for the textile plants in the Spartanburg area to operate on Saturdays and work was required of their employees on said days. The refusal of the appellant to work on Saturdays did not arise out of anything connected with her employment but was due to the fact that she had become a member of the Seventh Day Adventist Church. Her adherence to the tenets and dogma of the Seventh Day Adventist Church is not blameworthy or censorable, but her election to join that church was a matter personal to her and arose in no respect out of her employment.

Section 68-114 (1) and (2) of the Code, authorizes the Commission, in its discretion, to impose a disqualification in any case where an employee leaves his work voluntarily without "good cause" or is discharged for "misconduct connected with his most recent work." Section 68-114 (3) of the Code, authorizes the Commission, in its discretion, to impose a disqualification if it finds that the insured worker has failed "without good cause" to either apply for available suitable work or to accept suitable work when offered him by the employment office or the employer. It is then provided that in determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals.

The undisputed testimony shows that the appellant had worked in the textile industry and for the Spartan Mills for thirty-five years. There can be no dispute that the appellant was experienced in the textile work in which the Spartan Mills was engaged. She was, therefore, capable and fitted to perform, by past experience and training, the work offered her by her employer.

In the case of *Sweeney v. Unemployment Compensation Board of Review*, 477 Pa. Super. 243, 110 A. (2d) 843, it was held that work offered mine workers which was identical with previous employment fell within the category of "suitable work" contained in statute providing that employee shall be ineligible for unemployment compensation for any week in which unemployment is due to failure, without good cause, to accept suitable work when offered to him by an employer. Likewise, in *Hess Bros. v. Unemployment Compensation Board of Review*, 174 Pa. Super. 115, 100 A. (2d) 129, it was held that work is "suitable work" within the meaning of the Unemployment Compensation Act disqualifying unemployment compensation claims for benefits for failure to accept offer of "suitable work" only if claimant is capable of performing the work.

In the case of *Stone Mfg. Co. v. South Carolina Unemployment Security Commission*, et al., supra, it was held that the words "good cause" as used in the Unemployment Compensation law contemplates, ordinarily at least, a cause attributable to or connected with claimant's employment. In the case of *Gittewood v. Iowa Iron & Metal Co.*, 102 N. W. (2d) 146, it was held that under a statute disqualifying an employee for unemployment compensation benefits for voluntarily quitting his work without good cause attributable to his employer, the "good cause" for which an employee may voluntarily quit work must involve some fault on the part of the employer. In the case of *Sun Shipbuilding & Drydock Co. v. Unemployment Compensation Board of Review*, 348 Pa. 224, 36 A. (2d) 254, it was held that where an employee quits employment because habits of his fellow employees are distasteful to him, because work offends his [Vol. 47] religious or moral principles, or because his family objects to the type of work, does not quit for "good cause" within the meaning of a provision of the Unemployment

Compensation Act that employees shall be ineligible for compensation where unemployment is due to voluntarily leaving work without "good cause". In the last cited case, the Court said: "A laudable motive for leaving employment and a 'good cause' within the meaning of the Act are entirely different things."

The appellant asserts that she should not be disqualified because Section 68-114, subdivision 3 (a), of the Code, requires that in determining whether or not work is suitable for an individual, the Commission shall consider the degree of risk involved to her morals. As is heretofore stated, it cannot be said that there is any unsuitability of work in the Spartan Mills in which the appellant has been engaged for thirty-five years, nor can there be any risk to her morals involved in that type of work. When the General Assembly provided that in determining whether any work is suitable for an individual, the Commission should consider the degree of risk involved to morals, it obviously had in mind work, the character of which would be morally objectionable to any employee. No matter what the faith or creed of the employee was, we think this is made crystal clear because the Commission was required to consider also the degree of risk to the health and safety of the employee. Certainly, this had application to the kind and character of work in which the employee was engaged. The appellant admits that the work she was called upon to perform in Spartain Mills is suitable work and does not involve any moral risk to her on any day except her Sabbath.

The appellant directs our attention to the cases of Tary v. Board of Review, 161 Ohio St. 251, 119 N. E. (2d) 56, and Swenson v. Michigan Unemployment Security Commission, 340 Mich. 430, 65 N. W. (2d) 709, and asserts that the holding in these cases should be controlling. We cannot agree with this contention for these two cases involve very different situations from that with which this Court is now confronted. In neither of these cases did the restrictions imposed by the claimants upon their availability for work have anything to do with the termination of their last employment. In neither case was it made to appear that the restrictions imposed by the claimants were inconsistent with the prevailing standard for similar work in the particular

area involved. In the Swenson case, the Court was careful to point out that the Seventh Day Adventists were organized as a religious denomination in 1863 in Battle Creek, Michigan, and there were thousands of Seventh Day Adventists in that city and the community provided them with full time employment. The fact that one of the claimants refused to work from sundown on Friday until sundown on Saturday had no connection with the termination of their employment, because the opinion definitely asserts that the claimants were unemployed "due to lack of work". A careful study of the Swenson case convinces us that the community in which the claimants worked had adjusted itself to the beliefs of the Seventh Day Adventists and the opinion indicates that the prevailing standard of employment in the locality was consistent with their beliefs.

The Tary case involved a claim for unemployment benefits by a Seventh Day Adventist who refused a job referral involving Saturday work. The Court held, in a four to three decision, that under the statute, as amended, since the decision in the Kut case above referred to, the claimant was not disqualified for benefits since her morals would be affected by having to violate her religious beliefs by working on her Sabbath. There was a strong dissenting opinion filed by Justice Hart, joined in by two other Justices. In our opinion, this dissent is logical and a realistic statement of the rule as we conceive it to be and we apply such to the factual situation here involved. We quote, therefrom, the following:

"In my opinion, the suitability of the work here offered, so far as it related to morals, is not involved. If the work was properly suitable for another person as to morals, it was so suitable for the claimant so far as the character of the work itself was concerned. The claimant chose not to work because of a religious belief concerning the observance of the Sabbath of one of the days of the work-week period, which she had a perfect right to do. However, if she thus voluntarily disqualified herself on that account, she disqualified herself under the law to receive unemployment compensation for that same week period, including the day upon



which she could not, because of religious belief, work in any event. Incidentally, the position of the claimant [fol. 48] reveals an odd type of conscience, the philosophy of which precludes her from working on Saturday but approves her seeking of compensation for that same day of unemployment."

Our attention is also directed to a decision of the Supreme Court of North Carolina, *In Re Miller*, 243 N. C. 509, 91 S. E. (2d) 241, as sustaining the position of the appellant. It appears that Imogene R. Miller was employed by Cannon Mills, Inc., and during the period of her employment she became a Seventh Day Adventist, and because thereof she would not work as a spinner between sundown Friday and sundown Saturday. The Employment Security Commission of North Carolina held that since the employee restricted her services as stated she was not available for work. The North Carolina Supreme Court held that if the interpretation applied by the Commission was correct, then "the rationale of the statute would seem to be that in order to be eligible for benefits a claimant must be 'available for work' at any and all times, night and day, Sunday and week-days alike." If we placed this interpretation upon our unemployment compensation statute, such would be in conflict with Sections 64-4 and 64-5 of the Code, which makes it unlawful for an employer to require or permit an employee, especially a woman, to work in a mercantile or manufacturing establishment on Sunday, except as is provided in Section 64-6 of the 1952 Code.

The authorities cited and relied on by the appellant are either factually or legally distinguishable or are not considered controlling with us.

We conclude, in the light of the facts and circumstances of this case, that since the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works, and by restricting her willingness to work to periods or conditions to fit her own personal circumstances, then she was not available for work within the meaning of our Unemployment Compensation Law. Likewise, we find that the ap-

pellant failed to accept, without good cause, available suitable work offered her by her employer.

The appellant asserts that if this Court concludes, as we have hereinbefore, such construction violates her rights to religious freedom and to the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article I, sections 4 and 5 of the South Carolina Constitution of 1895.

The right of a person to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed, is guaranteed by the Constitution of this State and by the Constitution of the United States.

However, our Unemployment Compensation Act, as is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.

In *Kuts v. Albers Super Markets*, above cited, it was held that the Unemployment Compensation Act, when construed as not entitling one who refuses employment because of religious belief precluding Saturday work to benefits under the Act, is not unconstitutional as violative of constitutional right to religious freedom. It was further held that the allowance of unemployment compensation to one who refused employment because of religious belief precluding Saturday work, would be unconstitutional as discriminating in favor of such person. Cf. *Carolina Amusement Co. v. Martin*, 236 S. C. 558, 115 S. E. (2d) 273.

It is our conclusion that the decision of the South Carolina Employment Security Commission, as affirmed by the Circuit Court, was correct.

The exceptions of the appellant are overruled and the judgment of the lower Court is affirmed.

Taylor, C. J., and Lionel K. Legge and William L. Rhodes, Jr., Acting Associate Justices, concur. Bussey, A. J., dissents.

[fol. 49] BUSSEY, A. J. (dissenting): It is with reluctance that I find myself unable to concur in the majority opinion herein and feel conscientiously compelled to state my dissenting views thereabout. With only minor exceptions the facts are rather fully set forth in the majority opinion. I shall add thereto only the following facts:

It was stipulated by the parties that the decision of this court in the instant case shall control and be binding in the case of Sally W. Lloyd against the respondents, the issues in that case being the same as in the instant case. It appears from the record that the appellant and the said Sally W. Lloyd were the only two Seventh Day Adventists in the Spartanburg area who were unemployed at the time of the hearing.

From World War II until June 5, 1959 work on Saturdays at Spartan Mills was optional with all employees. When appellant was notified on June 5, 1959 that commencing June 6, 1959 she would be required to work on Saturday, she acquainted her employer with her religious beliefs and declined to report to work on Saturday. There is no question as to her conscientious adherence to the teaching of her church that the Sabbath day begins at sundown on Friday and ends at sundown on Saturday, during which time Seventh Day Adventists do not perform work or labor of any kind. Thereafter, she continued to work for six weeks on the same identical schedule that she had been working prior to the notice, and then was separated by the employer because of her refusal to work on Saturday. There is nothing in the record to indicate that she had been other than an exemplary employee for thirty-five years and the evidence is that she had never even been reprimanded for any misconduct. Prior to her separation from employment, the employer used a substitute for appellant when and as needed on Saturdays.

Appellant's claim for unemployment compensation benefits was filed on July 29, 1959, and up until the time of the hearing before the claims examiner, she had not been able to find other work, although she had applied for work at three other textile plants in the Spartanburg area, but had been unable to find employment since these plants, like most but not all other textile plants in the area, were at the time

operating six days a week, including Saturdays. It appears that a new employee of a textile plant generally is required to work on either the second or third shift, either of which would require work beyond sundown on Friday, and, therefore, it is difficult, if not impossible, for appellant to obtain new shift work, even in a textile plant operating on a five day week, which would not conflict with her Sabbath.

However, the record shows that the appellant was available for the very same work which she had been doing for many years prior to her discharge, and that she was able, willing and available for work in the textile industry or for any other available, suitable work which did not require her to violate her Sabbath. The fact, supported by the record, is that Seventh Day Adventists, including the appellant, are available for work in the labor market generally in the Spartanburg area. The record shows that there are approximately one hundred fifty Seventh Day Adventists in that area and that all of them, with the exception of the appellant and Sally Lloyd, were, at the time of the hearing, gainfully employed but not working on their Sabbath.

Although the exceptions are several in number, there are only two exceptions which I deem necessary for this court to decide, they being as follows:

1. Was the appellant able and available for work within the contemplation of the South Carolina Unemployment Compensation Law?
2. Was the appellant discharged for misconduct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law?

The answers to both of these questions involve the construction to be placed upon various sections of the South Carolina Unemployment Compensation Law, the pertinent provisions of which are set forth in the majority opinion and will not be repeated here.

[fol. 50] This court recognized that the statutory law under consideration is to be liberally construed in order to effect its beneficent purpose. *Stone Manufacturing Co. v. South Carolina Employment Security Commission*, 219 S. C. 239, 64 S. E. (2d) 644. The precise questions here in-

volved have not been passed upon by this court. However, for several reasons, little difficulty is involved in arriving at what I deem to be the correct answer to the first question. The instant case is clearly distinguishable from that line of cases wherein an employee is held to be ineligible because the employee has quit work for purely personal reasons totally unrelated to the employment. The appellant here did not quit her employment of long standing and made no change in connection therewith which resulted in her discharge. She was faithfully discharging her duties, just as she had for thirty-five years, in compliance with what had been the established practice of her employer for some fourteen years, and in keeping with her established, sincere and conscientious religious belief. The employer, on the other hand, made the decision to stop the practice of using a substitute, when needed, for the appellant on Saturdays, and forced her to thereafter either work in violation of her Sabbath or be discharged.

In the cited personal convenience case of *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S. C. 37, 28 S. E. (2d) 535, the opinion of Chief Circuit Judge Oxner, adopted by this court, contains the following statement:

*"I am constrained, therefore, to conclude that in order to be entitled to benefits under the act the unemployed individual must be able to and available for the work which he or she has been doing."* (Emphasis added.)

The opinion in that case quoted with approval from the opinion in *Brown-Brockmeyer Co. v. Board of Review*, etc., 70 Ohio App. 370, 45 N. E. (2d) 152, 155, the following language:

*"In our judgment subdivision 4 is applicable and determinative under the facts of the instant case. This means capable and available for the work she had been doing."*

Here the appellant was admittedly able to do and available for the work which she had been doing for many years.



but which work the employer decided to change to a schedule which conflicted with her Sabbath.

Even if the foregoing be not a sufficient answer to the first question, it must be borne in mind that the provisions of Secs. 68-113 and 68-114, being in pari materia, have to be construed together. Sec. 68-113 prescribes basic conditions which have to be met in order to qualify for benefits, while Sec. 68-114 enumerates a series of disqualifications; together they provide the overall formula governing the right to benefits. To make a claimant eligible only in the event he is willing to accept work without any limitation whatsoever, but to disqualify him under Sec. 68-114 only in the event he should refuse to accept "suitable work" would fix it so that the disqualification would be meaningless since a person willing to take only "suitable work" would always be ineligible in the first instance by virtue of Sec. 68-113.

There is a presumption against inconsistency and where there are two or more statutes on the same subject, in the absence of an express repelling clause, they are to be harmonized and every part allowed significance, if it can be done by any fair and reasonable interpretation. *Locke v. Dill*, 131 S. C. 1, 126 S. E. 747; *First Presbyterian Church of York v. York Depository*, 203 S. C. 410, 27 S. E. (2d) 573. I, therefore, conclude that the words "available for work" and "able to work and is available for work", as used in the statute mean "able to work and is available for suitable work" in the same sense as the words "suitable work" are used in Sec. 68-114.

Section 68-114 (3) (a) expressly commands the Commission to consider the degree of risk involved to one's morals in determining whether or not work is suitable for a particular individual.

It is urged by respondents that when the legislature made the provision about "risks to morals" it had in mind only work the character of which would be morally objectionable to any employee regardless of the moral or religious beliefs of the particular employee. This contention is answered [fol. 54] by the specific provisions of Sec. 68-114 (3) (a) which uses the words "suitable for an individual"; the Commission shall consider the degree of risk involved to

his . . . morals." (Emphasis added.) This clearly shows that the legislature intended that the Commission should take into consideration the moral risk involved to the particular claimant, rather than applying the test of what might or might not be morally objectionable to claimants collectively or to the public in general. It might not be amiss to point out that there is far from a unanimity of opinion on moral issues and that it would be exceedingly difficult, if not impossible, to say in all instances just what would or would not offend the morals of the public in general. It may very well be that the legislature had these fundamental facts in mind when it adopted the specific language of the statute making the risks to the morals of the individual claimant the test.

The respondents further urge that the statute in its entirety must, of course, be construed in the light of the evil which it sought to remedy, and in the light of conditions obtaining at the time of its enactment. They contend that the factual situation here does not bring this case within the evils sought to be remedied by the enactment of the statute, it being shown that one of the principal objectives of the statute was to "provide more stable employment." They argue that claimant's separation from her employment did not result from the failure of industry to provide stable employment.

Here, the claimant enjoyed stable employment provided by industry, one employer, for a period of thirty-five years, and moreover, stable employment which did not conflict with her religious beliefs. The appellant, in 1959, made no change in her religious faith which led to her discharge, nor did she attach any new condition to her stable employment of many years duration. The decision, the change, was made by the employer when it elected to no longer put a substitute in appellant's place on Saturdays, as it had done in the past. The only change or decision made by anyone at or near the time of appellant's separation from her employment was made by the employer and not by the employee. The employer simply elected not to continue to provide the particular employee the stable employment which had been provided for years.

Moreover, the general language of the declaration of policy contained in Section 68-36 is in the nature of a preamble to the specific provisions of the Act and the specific language of Sec. 68-114 is a very definite limitation on the provisions in the preamble. *Johnson v. Pratt*, 200 S. C. 315, 20 S. E. (2d) 865.

The precise issues involved in this appeal have not previously been before this court. However, the question of whether or not a Seventh Day Adventist is to be deprived of unemployment compensation benefits because of refusal to work on Saturday has been before the Supreme Courts of Michigan, Ohio and North Carolina, all of whom have decided the issue favorably to the contention of the appellant here. No appellate court decision to the contrary has come to my attention.

It is stated in appellant's brief and not challenged by the respondents here that the vast majority of State Commissions which have considered the problem under discussion have decided in favor of claimants such as the appellant here. Reference is made in the brief of appellant to a publication of the Labor Department of the Federal Government entitled Benefits Series Service, Unemployment Insurance, available at the office of the South Carolina Unemployment Security Commission, according to which Service the States of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maryland, Michigan, New York, Pennsylvania, Tennessee, Virginia, Washington and the District of Columbia have held administratively that persons who refuse to work on their Sabbath were not ineligible for benefits.

While none of these authorities is binding upon us, they strongly persuade me to the view that we should not lightly adopt or adhere to the position taken by the respondents here.

The North Carolina case of *In Re Miller*, 91 S. E. (2d) 241, is more nearly in point with the instant case than any other. That case arose in Rowan County, North Carolina, approximately one hundred miles from Spartanburg. Rowan County has a large textile industry and there was a finding of fact that 95% of the job openings in the textile plants [fol. 52] of the area would require work in violation of the

Seventh Day Adventist Sabbath. The claimant was a Seventh Day Adventist and was discharged by Cannon Mills because she would not work on her Sabbath, and she was denied benefits on the theory that she was not "available for work." The North Carolina statute is substantially identical with the South Carolina statute. On the facts and statute law almost identical with those in the present case, the North Carolina court had the following to say:

"We do not undertake to formulate an all-embracing rule for determining in every case what constitutes being 'available for suitable work' within the meaning of G. S. Sec. 96-13. The phrase is not susceptible of precise definition that will fit all fact situations. Necessarily, what constitutes availability for work within the meaning of the statute depends largely on the facts and circumstances of each case. However, we embrace the view that work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute. And necessarily the precepts of a religious belief to which one conscientiously and in good faith adheres is an essential part of one's moral standards. Therefore, where, as here, a person embraces a religious faith, the tenets and practices of which impel her to treat as her true Sabbath the period from sundown Friday until sundown Saturday, and to refrain from all secular work during this period, it would offend the moral conscience of such person to require her to engage in secular work during such period.

"We conclude that to have forced the claimant to work on her Sabbath would have been contrary to the intent and purpose of the statute, G. S. 96-13. The claimant, by refusing to consider employment during her Sabbath, did not render herself unavailable for work within the meaning of the statute."

The Supreme Court of Michigan, independently of the morals provision in its statute, which incidentally is substantially identical with that of South Carolina, held Seventh Day Adventists to be entitled to benefits in the case of Swenson v. Michigan Employment Security Commission.

340 Mich. 430, 65 N. W. (2d) 709. In that case it was contended that certain claimants were not entitled to benefits because they stated in their applications for benefits that they could not work from sundown on Friday to sundown on Saturday because they were Seventh Day Adventists. The Supreme Court of Michigan, sustaining the lower court in reversing the Commission and holding these claimants entitled to benefits, said:

"The law is designed to apply to all situations within its contemplation and the Commission's attitude, if upheld, would completely exclude thousands of citizens of this State from the benefits of the act. That could never have been the intent of the legislature; nor should we so construe the act as to accomplish that result."

The Supreme Court quoted with approval the following from the trial judge in that case:

"To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes of and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them."

While admittedly Seventh Day Adventists are no doubt more numerous in the State of Michigan than they are in the State of South Carolina, and there are before us in the record no figures as to the total number thereof in this State, it does clearly appear that there are approximately one hundred fifty of them in the Spartanburg area alone, all of whom are gainfully employed, other than the individuals concerned with this appeal. In addition to Seventh Day Adventists, there are, of course, many other citizens who conscientiously celebrate Saturday as the true Sabbath and it cannot be said that the legislature in the passage of the Unemployment Compensation Law had any intent or purpose to discriminate against these persons. Just as was the case in Michigan, these persons have not removed them-



selves from the labor market as is apparent in that virtually all of them are employed.

[fol. 53] In the Ohio case of *Tary v. Board of Review*, etc., 149 N. E. (2d) 56, the claimant was employed until termination on November 11, 1949, and at no time during her period of employment was she required to work on Saturday. She applied for unemployment benefits and received benefits until she was referred for employment which would have required her to work half a day on Saturday. She refused to accept such employment because of her being a Seventh Day Adventist. The Supreme Court held her entitled to benefits and pointed out the fact that the General Assembly of Ohio by a 1949 amendment had adopted a statutory provision, almost identical with the provisions of our Sec. 68-114 (3) (a), dealing with risk to the morals of the individual. In that decision the court distinguished its earlier decision in *Kut v. Albers Super Markets, Inc.*, 66 N. E. (2d) 643, decided prior to the 1949 amendment, and one of the principal authorities relied on by the respondents here.

All of the above cited cases are, in my judgment, extremely well reasoned, logical decisions and of strong persuasive force with us.

The majority opinion seeks to distinguish these cases, but in my humble opinion, they are not truly distinguishable, bearing in mind that the various sections of our law, being in *pari materia*, have to be construed together. The North Carolina case is, on the facts and the law, identical with the instant case.

The recent case of *Texas Employment Commission, et al. v. Hays*, 353 S. W. (2d) 924, did not involve a religious or moral issue, but strongly supports the position of the appellant here independently of the moral issue. In that case a high school student was available for employment on a very limited schedule but was available for work in suitable part time employment under the same part time employment conditions under which he had previously acquired his right to unemployment benefits. The court held that he was entitled to benefits. The holding there is entirely in keeping with the test of availability as laid down by this court in the *Judson Mills* case, the test being whether the claimant was available for the same work which he had been doing.

The respondents here cite no case in point from this or any other jurisdiction which sustains their position, but would urge this court to disregard the great weight of authority in other jurisdictions and adopt, without precedent, a different rule in South Carolina. They rely principally upon the cases of *Stone Manufacturing Co. v. South Carolina Employment Security Commission*, supra, and *Judson Mills v. South Carolina Unemployment Compensation Commission*, supra, and the Ohio case of *Kut v. Albers Super Markets, Inc.*, supra. In addition, the majority opinion cites *Hartsville Cotton Mill v. South Carolina Employment Security Commission*, 224 S. C. 407, 79 S. E. (2d) 381.

The South Carolina cases are clearly distinguishable. They involved situations where women claimants had voluntarily quit the work which they had been doing for laudable but entirely personal, family reasons, unconnected with any religious belief, and in neither instance were they still available for the same work which they had been doing. Here, appellant has been constantly available for the very same work which she had been doing for a long time before she was discharged and was, and is, still, available for any other work, her only limitation being that she would not work on her Sabbath. The appellant here is not unemployed as a result of any decision on her part which removed her either from her previous employment or the labor market generally.

In the *Kut* case the claimant was an Orthodox Jew who had been employed five days a week and was transferred to a position which required him to work on his Sabbath, to which he objected. His employer then offered to return him to his former position which required no work on his Sabbath and *Kut* declined, thus voluntarily making himself unavailable for the same work he had been doing all along, and it was on this basis that the Supreme Court of Ohio was unanimous in denying him the right to benefits. At the time of the *Kut* case, Ohio did not have the equivalent of our Section 68-114 (3) (a) in its statutory law, which fact is specifically pointed out in *Tary v. Board of Review*, supra.

The language quoted in the majority opinion from the *Kut* case, supra, is, in my humble view, obiter dictum and was clearly so regarded by two members of the Ohio Su-

[fol. 54] preme Court, it being totally unnecessary in that case to go any further than the simple basis upon which the Supreme Court was unanimous in denying Kut the right to benefits.

The cases of Unemployment Compensation Commission v. Tomko, et al., 192 Va. 463, 65 S. E. (2d) 524; Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc., 197 Va. 816, 91 S. E. (2d) 642; Sweeney v. Unemployment Compensation Board of Review, 177 Pa. Super. 243, 110 A. (2d) 843; Hess Bros. v. Unemployment Compensation Board of Review, 174 Pa. Super. 115, 100 A. (2d) 120; Gatewood v. Iowa Iron & Metal Company, 102 N. W. (2d) 146, and Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review, 358 Pa. 224, 56 A. (2d) 254, are all clearly distinguishable from the instant case, and, in my humble opinion, are simply not in point of the facts.

I shall not attempt to review the factual situations in each of said cases here, but do wish to point out that the case of Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review, *supra*, involved no issue of an employee quitting because habits of his fellow employees were distasteful to him, because the work offended his religious or moral principles, etc., and any language thereabout in the opinion of the Pennsylvania court is pure obiter dictum. The facts of that case were simply that the claimant had quit his job solely because he wanted to go into business for himself, in which he failed, and the court simply held that he had forfeited his status as an employee by said action and was, therefore, not entitled to benefits.

With respect to the second question, what has heretofore been said largely disposes of the same. The respondents contend that appellant was discharged for misconduct connected with her work. The evidence shows that she was discharged solely because she would not work on her Sabbath. Since appellant was available for work within the contemplation of the statute, she was not disqualified because she refused to accept work which was unsuitable within the purview of the statute. Therefore, her refusal to perform such work at the direction of her employer was not miscon-

duct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law.

In addition to the foregoing questions, the appellant contends that the ruling of the Commission and the lower court violated the right of claimant to religious freedom and equal protection of the laws guaranteed by the first and fourteenth amendments to the Constitution of the United States and Article I, Sections 4 and 5 of the South Carolina Constitution of 1895.

The majority opinion disposes of these questions by saying that our Unemployment Compensation Act places no restrictions upon the appellant's freedom of religion and by relying upon the obiter dictum language in the per curiam opinion from *Kut v. Albers Super Markets, supra*. This disposition of the constitutional questions does not, to my mind, squarely meet the issues. The appellant does not contend that the Act in itself in any sense is unconstitutional, but does contend that the construction placed thereon by the Commission, the lower court and the majority opinion, is in violation of her constitutional rights to both religious freedom and equal protection of the laws. It is worthy of note that in addition to two members of the Ohio Supreme Court, the United States Supreme Court regarded the language in the per curiam opinion in the *Kut* case dealing with the constitutional issues as nothing more than obiter dictum. The United States Supreme Court refused to consider the constitutional questions in the *Kut* case solely on the ground that the State court's decision was based on a nonfederal ground adequate to support it, the nonfederal ground being that *Kut* was denied benefits because he refused to return to his former employment where no violation of his Sabbath was involved. 329 U. S. 669, 91 L. Ed. 590, 67 S. Ct. 86.

In my view, this case would be correctly disposed of by reversing the order of the lower court to the end that the cause might be remanded to the South Carolina Employment Security Commission with direction that an award be made to the claimant in accord with the views hereinabove expressed. If we so disposed of the case, there would be no constitutional questions involved. In view, however, of the decision of the majority, the constitutional questions are,

of course, still present. I shall not here discuss at length or attempt to decide these constitutional questions but do feel that they are serious enough to require very full consideration before deciding to affirm the judgment of the lower court.

[fol. 55]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Appeal from Spartanburg County  
Honorable J. Woodrow Lewis, Judge

ADELL H. SHERBERT, Appellant,

against

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY,  
SR., as members of South Carolina Employment Security Commission and SPARTAN MILLS, Respondents.

NOTICE OF APPEAL

TO THE SUPREME COURT OF THE UNITED STATES—

Filed August 15, 1962

I. Notice is hereby given that Adell H. Sherbert, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Carolina, affirming the decree of the Court of Common Pleas for Spartanburg County, dated and entered in this action on May 17, 1962.

This appeal is taken pursuant to 28 U. S. C. Sec. 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Transcript of record filed in the Supreme Court of South Carolina.

(b) Opinion of the Supreme Court of South Carolina.



(c) Judgment of the Supreme Court of South Carolina.

(d) This notice of appeal.

(e) Certificate of the Clerk of this Court certifying the portions of the record covered by this designation.

III. The following questions are presented by this appeal:

[fol. 56] 1. Whether the eligibility requirement of the South Carolina Unemployment Compensation Law (Section 68-113, 1952 Code of Laws of South Carolina as amended) that a worker be "available for work" as construed and applied to appellant under the circumstances of this case to hold her not "available for work" and hence ineligible for unemployment benefits because she refused to work on her Saturday Sabbath after her employer changed her to a six-day week and because, after discharge, she was unwilling to apply for, or to accept, employment that would require her to work on her Sabbath, sun-down Friday to sun-down Saturday, in violation of her religious conviction and the tenets of her denomination, that work on such Sabbath is forbidden by God—Whether the statute, as so construed and applied to appellant and the facts of this case:

(a) Violate the guarantee of religious freedom contained in the First Amendment as absorbed into the Fourteenth Amendment to the Constitution of the United States; or

(b) Violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the South Carolina Unemployment Compensation Law (Section 68-114, 1952 Code of Laws of South Carolina, as amended), providing for disqualification for unemployment benefits upon finding by the state Employment Security Commission that a worker—

(1) "left voluntarily without good cause his most recent work",

(2) "has been discharged for misconduct connected with his most recent work",

(3) "has failed, without good cause . . . (b) to accept available suitable work when offered him",

and further providing—

- (3)(a) "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, . . . .

as here construed and applied to appellant under the same circumstances partially summarized in Question No. 1 so as to uphold her disqualification by the state Employment Security Commission upon review on appeal to the South Carolina Supreme Court:

(a) Violates the guarantee of religious freedom contained in the First Amendment as absorbed into the Fourteenth Amendment to the Constitution of the United States;

(b) Violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Dockery, Ruff, Perry, Bond & Cobb, By James O. Cobb, Charlotte, North Carolina.

Lyles & Lyles, By Frank A. Lyles, Spartanburg, South Carolina, William D. Donnelly, 1625 K Street N. W., Washington 6, D. C.

[fol. 58] Proof of service (omitted in printing).

[fol. 59] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 60]

#### SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—December 17, 1962

APPEAL from the Supreme Court of the State of South Carolina.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

December 17, 1962

No. 526

Office-Supreme Court, U.S.

FILED

OCT 15 1962

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

ADELL H. SHERBERT, *Appellant*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLO-  
WAY, SR., as members of SOUTH CAROLINA EMPLOY-  
MENT SECURITY COMMISSION and SPARTAN MILLS.  
*Respondents.*

On Appeal from the Supreme Court of South Carolina

**STATEMENT AS TO JURISDICTION**

FRANK A. LYLES  
Spartanburg, South Carolina

JAMES O. COBB  
Charlotte, North Carolina

— WILLIAM D. DONNELLY  
Washington, D. C.

*Counsel for Appellant*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

\_\_\_\_\_  
No.  
\_\_\_\_\_

**ADELL H. SHERBERT, Appellant,**

v.

**CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLO-  
WAY, SR., as members of SOUTH CAROLINA EMPLOY-  
MENT SECURITY COMMISSION and SPARTAN MILLS,**  
*Respondents.*

\_\_\_\_\_  
**On Appeal from the Supreme Court of South Carolina**  
\_\_\_\_\_

**STATEMENT AS TO JURISDICTION**  
\_\_\_\_\_

Appellant appeals from the judgment of the Su-  
preme Court of South Carolina entered on May 17,  
1962, affirming a decree of the Court of Common Pleas  
of Spartanburg County, South Carolina.

### OPINIONS BELOW

The "decree" (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina (App., *infra*, pp. 1a-7a) is not officially reported. The opinion of the Supreme Court of South Carolina (App., *infra*, pp. 8a-25a) and the dissenting opinion (App., *infra*, pp. 26a-39a) are reported in 125 S.E. 2d 737. They are not yet officially reported.

### JURISDICTION

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960 (Tr. 3, 29; App., *infra*, pp. 1a, 10a).<sup>1</sup> The opinion of the Supreme Court of South Carolina, which also constitutes its final judgment<sup>2</sup> was filed and entered May 17, 1962 (Tr. 41; App., *infra*, p. 8a). Appellant filed notice of appeal August 15, 1960. This Court has jurisdiction of this appeal under 28 U.S.C. sec. 1257(2). *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100; *Hamilton v. Regents of University of California*, 293 U.S. 245, 257-258; *Lathrop v. Donohue*, 367 U.S. 820, 824.

### QUESTIONS PRESENTED

Whether, where a state unemployment compensation law requires as a condition precedent to eligibility for unemployment compensation that an applicant be "available for work" and further provides for disqualification for a stated number of weeks if the appli-

<sup>1</sup> Herein, "Tr." refers to the record certified to this Court by the Clerk of the Supreme Court of South Carolina, including the proceedings therein.

<sup>2</sup> The covering certificate of the record by the Clerk of the Supreme Court of South Carolina, in pertinent part, states that the "opinion [of the Supreme Court of South Carolina] is the final judgment of this court" (Tr., unnumbered first page).

nant fails, without good cause, to "accept available suitable work," and such statute is construed and applied to make ineligible and to disqualify a woman who, in the practice of her religious belief, as a member of the Seventh-day Adventist church, refuses to work from sundown on Friday to sundown on Saturday, either for her employer, when he—22 months after she became an Adventist—changes to a six-day week, or for anyone else, but who is willing to work at any decent job either in her accustomed textile industry or in any other industry, and who resides in a city where all the 150 other members of her church, all practicing the same abstention from Friday evening-Saturday, are gainfully employed and experience no particular difficulty in obtaining jobs—Whether the state statute, as so construed and applied,

(1) Violates the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment.

(2) Is so arbitrary and discriminatory as to violate (a) the due process clause of the Fourteenth Amendment including the inhibitions of the First Amendment against abridgement of the free exercise of religion or (b) the equal protection clause of the Fourteenth Amendment.

#### **STATUTES INVOLVED**

The South Carolina Unemployment Compensation Law provides (S.C. Code (1952)):

##### **SEC. 68-113. BENEFITS ELIGIBILITY CONDITIONS.**

An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

(3) He is able to work and is available for work

4

SEC. 68-114. DISQUALIFICATION FOR BENEFITS.

Any insured worker shall be ineligible for benefits:

(2) "*Discharge for misconduct.*" If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period)

(3) "*Failure to accept work.*" If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer . . . such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period)

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals. . . .<sup>3</sup>

<sup>3</sup> This subsection (a) was added to section 68-114 by amendment in 1955. S.C. Acts 1955, No. 254, secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it has not yet been carried into the Code. Cf. S.C. Code (1952) sec. 68-114 (Supp. 1960).

### STATEMENT

This action was initiated by appellant's petition in the Court of Common Pleas for Spartanburg County, South Carolina (Tr. 20-23) under section 68-165, S.C. Code (1952) to review and reverse the decision of the state Employment Security Commission that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturdays because of her religious belief as a Seventh-day Adventist and hence was not "available for work" as required by sec. 68-113, S.C. Code (1952);

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday (Tr. 18-20). The Court of Common Pleas affirmed the decision of the Commission (Tr. 29-36; App., *infra*, pp. 1a-7a). The Supreme Court of South Carolina affirmed (Tr. 41-48; App., *infra*, pp. 8a-25a). Bussey, J., filed a dissenting opinion (Tr. 49-54; App., *infra*, pp. 26a-36a).

*There is no dispute in the facts of record.*—Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina as a spool-tender for thirty-five years (Tr. 4, 8) and had been so employed without interruption since August 8, 1938 (Tr. 6, 21). From the end of World War II and until June 6, 1959, Saturday work in this plant had been on a voluntary basis (Tr. 5). Appellant worked only five days a week, Monday through Friday, on the first shift—7 a.m. to 3 p.m. (Tr. 8-9).



On August 5, 1957, appellant became a member of the Seventh-day Adventist church (Tr. 13, 6).<sup>4</sup> The religious teaching of that church is that the Sabbath commanded by God commences at sundown Friday evening and ends at sundown on Saturday evening (Tr. 11) and labor or common work during that period is forbidden (Tr. 14). Appellant, as a member of the denomination, shares that belief and in the practice of her religious belief (Tr. 11-12) did not work during the Sabbath after she joined the church on August 5, 1957 (Tr. 13).

For twenty-two months after so joining the Seventh-day Adventist church, without being required to work, and not working, on Saturday, she continued her uninterrupted employment with Spartan Mills until June 5, 1959 (Tr. 5-6). Her employer changed to a six-day week on that day, posting a notice that all employees would be required to work on Saturdays thereafter (Tr. 5-6, 9). Appellant explained to her employer that she could not work on Saturday because it was her Sabbath, revealed by God (Tr. 12), and thereafter, refusing and failing to work on Saturdays, she missed work on six successive Saturdays (Tr. 6, 10). She was discharged on July 27, 1959 (Tr. 9) solely because of her refusal to work on Saturday, her Sabbath (Tr. 6-12). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were most mills in the area (Tr. 10) and she remained unwilling to take any work that would require her to work on her Sabbath (Tr. 11). Appellant has at all times been willing to work in another mill or in any other industry

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<sup>4</sup> At the hearing held October 2, 1959 (Tr. 6) she testified that she became a member of the Seventh-day Adventist church "two years ago the 6th day of this past August" (Tr. 13).

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so long as she was not required to work on her Sabbath (Tr. 12).

The unquestioned evidence showed that, other than appellant and one other,<sup>5</sup> all of the approximately one hundred and fifty members of the Seventh-day Adventist church in Spartanburg are gainfully employed in that area and experience no particular difficulty in obtaining jobs although none works on the Saturday Sabbath (Tr. 13-14).

There was no evidence that in the area there were not numerous jobs requiring no Sabbath work and otherwise suitable for appellant; neither was there any evidence to suggest that any such jobs were presently open, or that appellant had been referred to them or failed to apply or accept any such job.

Appellant on July 29, 1959, filed her claim with the South Carolina Employment Security Commission for unemployment compensation benefits under the law. See, 68.1 et seq., S.C. Code (1952) (Tr. 3-4). The claims examiner found the appellant ineligible under sec. 68-113(3) because not "available for work" in that her refusal to work on Saturday made her "not available for work during the regular work week observed in the industry and area" in which she had worked (Tr. 4-5). He also held her "disqualified" under sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused Saturday absences (Tr. 4-5).

The affirming decision of the Referee or Appeal Tribunal (Tr. 16-18) was affirmed by the appellee Commission (Tr. 18-20).

<sup>5</sup> In *Sally W. Lloyd v. Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case.

On the petition of the appellant, the answers of the state commission and of the employer, Spartan Mills, both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed (App., *infra*, pp. 1a-7a).

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, violated the free exercise of religion clause of the First Amendment included in the Fourteenth Amendment and violated the First Amendment as absorbed into the Fourteenth in denying appellant the protection and benefits available to those who observe Sunday as the Sabbath (Tr. 37-38).

The Supreme Court of South Carolina, in its opinion (App. *infra*, p. 9a) concluded (*id.*, p. 24a):

(1) Appellant was ineligible because not "available for work" under sec. 68-113(3), S. C. Code (1952) in that she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works."

(2) Appellant was properly disqualified for five weeks benefits, not on the ground assigned by the court below—misconduct under sec. 68-114(2)—but because under sec. 68-114(3) she had "failed, without good cause . . . to accept available suitable work when offered . . . by the employer."

In reaching these conclusions, the court first stated (*id.*, p. 16a):

"The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be

determined whether or not the claimant is actually and *currently attached to the labor market*, which in this case is *unrestricted availability for work*.<sup>6</sup> (Emphasis supplied.)

*As to eligibility.*—The court, emphasized, by quotations, that to be “available”, the claimant “must be able to and available for the work which he or she has been doing” (*id.*, p. 14a) and if he restricts his availability to hours or conditions “not usual in his occupation or trade” he is not available (*id.*, pp. 16a-17a).

The court then converted the six-day week requirement newly imposed by the appellant's employer into the “usual and customary”. Although it had earlier in its opinion conceded that up until June 5, 1959, the employer plant had not required work on Saturday (*id.*, p. 9a) the opinion reaches the conclusion (*id.*, p. 19a):

“Here, the appellant attempted to limit or restrict her willingness to work to certain days and a certain shift, *not usual* in the textile industry in the Spartanburg area . . . . *It is implicit* in the record that it is *usual and customary* for the textile plants in the Spartanburg area to operate on Saturdays and work was required of their employees on said days.” (Emphasis supplied.)

From this, the conclusion that appellant was not “available”, was then drawn (*id.*, p. 24a).<sup>6</sup>

<sup>6</sup> The dissenting opinion negatives the misleading implications of the majority opinion as to the facts. It states (*id.*, p. 28a):

“The appellant here did not quit her employment of long standing and made no change in connection therewith which resulted in her discharge. She was faithfully discharging her duties, just as she had for thirty-five years, in compliance with what had been the established practice of her employer for

*As to disqualification.*—The court sustained the five-week disqualification but on a ground different from that adopted below. It invoked sec. 68-114(3) which disqualifies for failure to accept “available suitable work”. Since this sets up basically the same test of availability, the opinion relies largely on the reasoning as to eligibility. It found no distinguishing difficulty with the presence in sec. 68-114(3) of the word “suitable”, or with the provision of subsection 68-114(3)(a), added in 1955, requiring the Commission, in determining whether work is suitable for an individual, to “consider the degree of risk involved to his health, safety and morals”. This, it held was a purely objective test i.e., the effect on the health, safety and morals of “any employee” (*id.*, pp. 21a-22a).

*As to constitutional validity of the law as construed.*—The court purported to restate the Federal questions raised by appellant (*id.*, p. 24a-25a):

“The appellant asserts that if this Court concludes, as we have hereinbefore, such construction violates her rights to religious freedom and to the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the Constitution of the United States . . . .”

It dismissed these contentions with the statement (*id.*, p. 25a):

“However, our Unemployment Compensation Act, as [it] is hereinbefore construed, places no

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some fourteen years, and in keeping with her established, sincere and conscientious religious belief.”

(*id.*, p. 29a)

Here the appellant was admittedly able to do and available for the work which she had been doing for many years, but which work the employer decided [to] change to a schedule which conflicted with her Sabbath.



restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.

Accordingly, the decree of the lower court was affirmed (*ibid.*).

### **THE FEDERAL QUESTIONS ARE SUBSTANTIAL**

The Supreme Court of South Carolina has ruled that the payment by the state of unemployment benefits under the state unemployment compensation law may be conditioned upon the surrender by the claimant of her right, in the exercise and practice of her religious belief, to abstain from gainful work from sundown Friday to sundown Saturday.

1. As construed and applied by the court below, the state statute imposes a substantial penalty on the exercise by appellant of her religious freedom under the First Amendment and the Fourteenth Amendment. If, because of her religious belief, she abstains from work on her Sabbath, the law, as construed, directly penalizes and punishes her unwillingness so to work at that time. The imposition of the financial burden of the penalty is equally as obnoxious as the exaction of a tax as a condition to the exercise of a First Amendment liberty. *Murdoch v. Pennsylvania*, 319 U. S. 105, 113; *Jones v. Opelika*, 319 U. S. 103, adopting per cur. on rehearing the dissenting opinion in 316 U. S. 584, 600-602, 607-609; *Follett v. McCormack*, 321 U. S. 573, 577.

Even if the withholding of the benefits be regarded as merely an indirect burden, its necessary effect must be to discourage and impede the observance of the Saturday Sabbath by those whose religious belief re-

quires such observance. The law, so construed, is therefore constitutionally invalid for the same reason. *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 461; *Bates v. Little Rock*, 361 U. S. 516, 523; see *American Communications Ass'n v. Douds*, 339 U. S. 382, 402; *Braunfeld v. Brown*, 366 U. S. 599, 607. Invasion of appellant's constitutional right cannot be sustained as a mere incident or consequence of a regulation within the power of the State. The record here is clear that appellant is attached to the labor market; all 150 members of appellant's Seventh-day Adventist church in Spartanburg, all also unwilling to work on their Sabbath, are gainfully employed and experience no particular difficulty in obtaining jobs (Tr. 13-14). Hence, advancement of the policy and purposes underlying the law and its requirement of availability for work—to insure against involuntary employment of those who would otherwise be working if a job were unfilled—is in no way impaired by appellant's unwillingness to work on Saturday. The Court below chose merely to ignore these facts of record.

2. The statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment. We may concede that the State has no affirmative duty to grant unemployment compensation benefits. But, having embarked on the program, it may not impose as a condition to the enjoyment of the privilege the relinquishment or surrender of constitutional rights not germane to the enactment. It is no answer to say that appellant is not compelled to accept the benefits. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532 (1922); *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 593-594 (1926); cf. *Hannegan v. Esquire*, 327 U. S. 146, 156 (1946).

There is no room here for suggestion that payment of the benefits claimed might finance activities detrimental to the public interest (*Speiser v. Randall*, 357 U. S. 513, 527; cf. *Garner v. Board of Public Works*, 341 U. S. 716, 721) or that the condition, as applied here, is essential to protect the effectiveness of the law that confers the benefit (cf. *Oklahoma v. Civil Service Comm'n*, 330 U. S. 127, 143).

Payment of a Government annuity, though gratuitous, may not be withheld as a punishment for exercise of a liberty or right guaranteed by the Constitution. *Steinberg v. United States*, 143 C. Cl. 1, 163 F. Supp. 590, 591 (1958). Though it be a mere privilege, tax-exemption may not be conditioned on surrender of the right to procedural due process. *Speiser v. Randall*, 357 U. S. 513, 518; *First Unitarian Church v. Los Angeles*, 357 U. S. 545. Public office as a notary may not be conditioned on surrender of religious freedom (*Torcaso v. Watkins*, 367 U. S. 488, 495). Nor may public employment be conditioned on surrender or waiver of constitutional rights. *Wiemann v. Updegraff*, 344 U. S. 183, 192 (1952); *Slochower v. Board of Education*, 350 U. S. 551, 558; *Cramp v. Board of Public Instruction*, 368 U. S. 278. The right to unemployment compensation may not be conditioned on surrender of the right of free speech. *Syrek v. California Insurance App. Board*, 54 Cal. 2d 519, 532; 354 P. 2d 625 (1960). Neither may surrender of constitutional rights be made the condition to enjoyment of the privilege of use of state property for meetings (*Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946)) or enjoyment of the privilege of public housing (*Lawson v. Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605, cert. denied

350 U.S. 882). So here, it is submitted, surrender of appellant's religious freedom to worship God on her Sabbath may not be made a condition of her right to unemployment compensation.

3. The statute as construed, deprives appellant of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The state court modified its statement that the statute requires unrestricted availability (App., *infra*, p. 16a). It indicated that because of the provisions of sections 64-4 and 64-5, S. C. Code (1952), an employee, especially a woman, would not, to be eligible for unemployment benefits, be required to be available for work on Sunday (*id.*, p. 24a). Reference to these statutes (App., *infra*, pp. 40-41) shows that the prohibition against Sunday employment is based on religious grounds since they further provide that, even in the case of permitted Sunday work in national emergency manufacturing plants, "... no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work" (*id.*, pp. 40, 41). Thus, the unemployment compensation law, as construed, discriminates between believers of different religious faiths and deprives appellant of equal right to benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law. The impartiality required of the State with respect to different religions under the First Amendment (*Everson v. Board of Education*, 330 U. S. 1, 15, 18; *McColum v. Board of Education*, 333 U. S. 203, 210; *Zorach v. Clauson*, 343 U. S. 306, 313-314) cannot be less rigid under the equal protection clause of the Fourteenth.

4. The question whether unwillingness, for religious reasons, to take employment involving work on the

Saturday Sabbath, is protected by the federal constitution against surrender as a condition to enjoyment of unemployment compensation is one of broad and continuing general importance to a large number of citizens. Three state courts have upheld a claimant's right to compensation despite his refusal to work on Saturday, without passing on the constitutional questions, and merely as a matter of statutory construction. *Swenson v. Michigan Employment Security Commission*, 340 Mich. 430, 65 N.W. 2d 709 (1954); *Targy v. Board of Review*, 161 O.S. 251, 119 N.E. 2d 56; *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241 (1956). In *Kut v. Albers Super Markets, Inc.*, 146 O.S. 522, 66 N.E. 2d 643 (1946) prior to 1949 amendment of the Ohio law the constitutional right and protection was denied. But non-availability was also based on a second ground—refusal to accept employment in the claimant's old job involving no Saturday work. This Court dismissed appeal on the stated ground that the decision below was "based upon a non-federal ground adequate to support it". *Kut v. Bureau of Employment Compensation*, 329 U. S. 669.

As indicated in the dissenting opinion of Bussey, J., in the court below (App., *infra*, p. 32a) the authorities of a large number of other states have been required, at the administrative level, to pass upon the question here raised. Most have been favorable to the constitutional right. Some have not.

The question will obviously recur. Unfortunately, the amounts involved seldom justify, and the claimants in such cases are usually ill-prepared to bear, the expense necessary to obtain judicial vindication of their rights.



### CONCLUSION

It is submitted that authoritative determination of the questions presented on this appeal is pivotal in the right administration of the legislation on unemployment compensation in most of the States. Because of the large number of persons affected, the issues must be regarded as of general importance.

If, because of the form of the state court's statement of the federal constitutional questions presented by appellant and considered by it (App., *infra*, p. 25a) this Court should conclude that the appeal jurisdiction is not properly invoked, it is submitted that the considerations stated above amply justify the exercise of the discretionary certiorari jurisdiction of this Court. 28 U.S.C. sec. 2103.

Respectfully,

FRANK A. LYLES  
Spartanburg, South Carolina

JAMES O. COBB  
Charlotte, North Carolina

WILLIAM D. DONNELLY  
Washington, D. C.

*Counsel for Appellant*

October, 1962

**APPENDIX**

COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY

ADELL H. SHERBERT, *Plaintiff*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY,  
SR., as members of South Carolina Employment Security  
Commission and SPARTAN MILLS, *Defendants*.

(June 27, 1960)

**Decree**

The petitioner, hereinafter referred to as the claimant, instituted this action pursuant to Section 68-165, Code of Laws of South Carolina, 1952, seeking judicial review of a decision of the South Carolina Employment Security Commission in which it was held that a disqualification of five weeks had been properly imposed upon her and that because of her unavailability for work she was not entitled unemployment benefits. The decision of the Commission affirmed the prior decision of the Appeal Tribunal which had, in turn, affirmed the initial determination of the Claims Examiner.

This case has been considered on the basis of the record made in the proceedings which culminated in the decision of the Commission and has been fully argued before me by the General Counsel for the Commission and the attorneys for the claimant and the employer.

The essential facts are not in dispute. Claimant had been employed by Spartan Mills, Beaumont Division, for more than thirty years. She was working as a spool tender on the first shift and her hours were from 7. a.m. to 3 p.m. On June 5, 1959, she was notified that commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although her em-

ployer's plant and all other textile plants in that area were operating on that day. After she had stayed out for six Saturdays, she was discharged because of her refusal to work as instructed. The reason given by her for refusing to work on Saturday was that she had joined the Seventh Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. She has applied for work at a number of other textile plants, but since they all operate six days a week she would not accept employment with any of them. Furthermore, she testified that on account of her religion she would accept work only on the first shift from Monday to Friday.

By this action, claimant seeks judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

The facts and the issues in the instant case are identical with those in the case of *Pierce W. Strange against the Commission*, which was heard and decided by Judge Joseph R. Moss, the Presiding Judge of the Court of Common Pleas for Greenville County.

In the *Strange case*, the claimant had been discharged by his employer because he refused to work on Saturday, giving as his reason therefor that he had joined the Seventh Day Adventist Church, whose Sabbath is from sundown Friday until sundown Saturday, during which time its members do not work. He had testified that he would not accept any job with his former employer or any other employer on a normal five-day week basis if he were told that he might be sometimes required to work on Saturdays. He also testified that his former employer was operating at that time, in part, on a six-day week basis and that other plants in the area, providing similar jobs, were likewise operating. The Commission had held in that case, as it did in the instant case, that the claimant

had been discharged for misconduct connected with his work, for which a disqualification was imposed, and that he was unavailable for work as of the date upon which he had filed his claim for benefits.

The claimant, Pierce W. Strange, thereupon brought an action seeking judicial review of the decision of the Commission, both as to the imposition of the disqualification and as to the finding of unavailability.

In passing upon the disqualification issue Judge Moss held as follows:

"Section 68-114 (1) and (2) authorizes the Commission in its discretion to impose a disqualification in any case where an employee leaves his work voluntarily without 'good cause' or is discharged for 'misconduct connected with his work'. The 'good cause', or the want of it, and the 'misconduct connected with the work' thus contemplated need not have any relation to censorable conduct. When the motivating reason for the termination of employment stems from considerations personal to the employee, the fact that the employee pursues the course which society would generally approve, does not necessarily mean that it amounts to 'good cause' or does not amount to 'misconduct connected with work' within the contemplation of the Act. What is contemplated by the Act, insofar as a disqualification is concerned, is the protection of employees who become unemployed by reason of the particular employer's failure to provide the particular employee with continued job opportunities under reasonable conditions.

"Thus, the Supreme Court of South Carolina, in *Stone Manufacturing Company v. South Carolina Employment Security Commission*, 219 S. C. 239, 64 S. E. (2d) 644, quoting with approval from *Sun Shipbuilding & Drydock Company v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A (2d) 254, said:

“‘A laudable motive for leaving employment and a ‘good cause’ within the meaning of the Act are entirely different things.’

“In the *Stone Manufacturing Company case*, the claimant left her employment at the employer's plant at Columbia, South Carolina, when her husband, a member of the Armed Forces, was transferred from Fort Jackson, near Columbia, S. C., to Fort Bragg, near Fayetteville, N. C. Certainly the first duty of a wife is to be with her husband and to maintain a home for her family. Instead of criticizing her for discharging that duty, society would expect it of her. But while her reason for leaving was personally a good one, it was wholly unrelated to any failure upon the part of the employer to provide her with employment under reasonable conditions as he had in the past, and the Court held that her laudable motive nevertheless was not ‘good cause’ within the meaning of the Act.

“In this case, the claimant, during his more than twenty years of employment by the employer, had worked on Saturdays from time to time whenever Saturday work was necessary. His refusal to continue to work on Saturdays as he had in the past did not arise out of anything connected with the employment, but solely by reason of the fact that he had become a member of the Seventh Day Adventist Church. His adherence to his new religious belief is certainly not blameworthy or censorable, but his election to join that church was a matter personal to him, and arose in no respect out of his employment. Just as the wife who found it impossible to continue her employment because of the requirements of her duties to her husband, so the claimant here found it impossible to continue his employment as he had in the past because of the impact of his new religious beliefs. No one has suggested that the actions of the claimant in either case would not be approved by society in general, but in each case, the claimant chose to be faithful to a belief or duty



entirely personal to him and inconsistent with his continued employment upon the same basis as theretofore."

Judge Moss thereupon held that the imposition of the disqualification was clearly required by the facts.

In my opinion the imposition of the disqualification in the instant case was likewise required by the facts. The decision of the Commission on that issue is therefore affirmed.

In passing upon the issue of availability, Judge Moss held as follows:

"It is contended by the claimant that since becoming a Seventh Day Adventist, he believes that the Sabbath should be celebrated from sundown on Friday until sundown on Saturday and that to require him to work within those hours would be offensive to his religious beliefs and would involve risk to his morals within the contemplation of Section 68-114 (3) (a). He was thus emphatic that he would not accept any job with his former employer or anyone else if he were told that he might sometimes be required to work on Saturdays.

"In imposing this restriction upon his availability, he seems clearly to have made himself totally unavailable for work in the textile industry in the Piedmont Section of South Carolina, for the record discloses, and the claimant concedes, that such work is, upon occasion, generally required by textile plants in that area. Indeed, the limitations imposed by the claimant would make him available for only four days a week for section shift operation, which normally starts at 4:00 o'clock in the afternoon and runs to midnight. For a job on the second shift, the claimant would thus be available for work only on Mondays, Tuesdays, Wednesdays and Thursdays. By the limitations imposed by him, he would be unavailable on Fridays and Saturdays, and the laws of the State of South Carolina prohibit an employer in the textile industry from suffering or permitting anyone, with certain exceptions

not here applicable, to work on Sunday. For job openings on any other shift, the claimant would be available, at the most, for work on Mondays through Fridays, inclusive, for he has made himself unavailable for work on Saturdays, and the statutory prohibition prevents his working on Sundays.

"As a practical matter, the Court must conclude under the circumstances that the claimant fails to meet the availability requirements of the law. \* \* \* The reason for the termination of his employment (his refusal to work on any job in which work on Saturdays might sometimes be required) prevents his acceptance of like work with any other employer in the area, and practically viewed, there is an absolute unavailability of the claimant for employment in the textile industry in this Section."  
\* \* \*

"Clearly the general purpose of the act was to mitigate the disastrous effects of involuntary unemployment, resulting from a failure of industry to provide sufficient employment opportunities. It was not intended to provide compensation for any person, who, because of considerations personal to him, became unavailable for employment when industry generally provided abundant job opportunities for the people in the area.

"Thus, the Supreme Court of South Carolina, in *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S. C. 37, 28 S. E. (2d) 535, held the claimant unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift, upon which she had been working, even though she was apparently available for employment on either the first or second shifts. The claimant in that case was a textile worker. She was the mother of four children. A relative took care of the young children during the hours of her employment. The relative became unavailable for the care of the

children and the claimant quit her employment and limited her availability for employment to the first or second shifts.

"The duty of the claimant in the *Judson Mills case* to take care of her young children is certainly paramount to any consideration of connection with her employment. But if the restrictions imposed by her upon her availability for employment led the Supreme Court of the State to conclude that she was unavailable for employment within the meaning of the Act, then clearly, the claimant in this case was unavailable for employment."

"Since the claimant's restrictions upon his own availability for employment in the industry in which he was employed for over twenty years and in the locality in which he lived and worked, makes him unavailable for employment in that industry in that locality, it must be concluded that he is unavailable for employment within the meaning of the Act."

In my opinion, the restrictions which claimant in the instant case placed upon her availability for employment made her unavailable for employment within the contemplation of the South Carolina Unemployment Compensation Law. The decision of the Commission on that issue is therefore affirmed.

It is therefore ordered, adjudged and decreed that the decision of the South Carolina Employment Security Commission holding that a disqualification of five weeks had been properly imposed upon petitioner and that because of her unavailability for work she was not entitled to unemployment benefits be and the same is hereby affirmed. It is further ordered that the petition of the petitioner be dismissed with costs.

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ADELL H. SHERBERT, *Appellant*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY,  
SR., as members of South Carolina Employment  
Security Commission, and Spartan Mills, *Respondents*.

Appeal from Spartanburg County

J. WOODROW LEWIS, Judge

Case No. 4819

Opinion No. 17915

Filed May 17, 1962

**Affirmed**

Lyles & Lyles, of Spartanburg, and Dockery, Ruff, Perry,  
Bond & Cobb, of Charlotte, North Carolina, for appellant.

Jas. Julien Bush, of Columbia; Benjamin O. Johnson  
and Butler & Chapman, all of Spartanburg, for  
respondents.

Moss, A. J.: Adell H. Sherbert, the appellant herein, did, on July 29, 1959, file her claim with the South Carolina Employment Security Commission, one of the respondents herein, for unemployment compensation benefits under the "South Carolina Unemployment Compensation Law," Section 68-1, et seq., 1952 Code of Laws of South Carolina.

The appellant, a textile employee, had worked for Spartan Mills, Beaumont Division, a respondent herein, for approximately thirty-five years. Immediately prior to June 5, 1959, she was working as a spool tender Monday through Friday, on the first shift, and her hours were from

7:00 A.M. until 3:00 P.M. On June 5, 1959, she was notified by her employer that, commencing June 6, 1959, she would be required to work on Saturday. This she refused to do, although the employer's plant, and other textile plants in the area, were operating on a six day basis, which included Saturday. Prior to June 5, 1959, Saturday work in Spartan Mills was on a voluntary basis and the appellant had not worked at any time between sundown on Friday and sundown on Saturday after she became a member, on August 5, 1957, of the Seventh Day Adventist Church. The appellant failed to report for work on six successive Saturdays and she was discharged on July 27, 1959, because of her refusal to work on Saturdays. The reason given by the appellant for refusing to work on Saturdays was that for nearly two years prior to her discharge she had been a member of the Seventh Day Adventist Church and it was the teaching of her Church that the Sabbath begins at sundown Friday and ends at sundown Saturday, during which time she should not perform work or labor of any kind. The appellant applied for work at three other textile plants in the Spartanburg area but had been unable to find employment since these plants and practically all of the other textile plants in the area operated six days a week, including Saturday. The first, second and third shifts of Spartan Mills included work on Saturday.

It appears that on September 4, 1959, a claims examiner of the Commission, pursuant to Sections 68-152-4 of the 1952 Code, issued a determination holding that the appellant had been separated from her employment because she was unavailable for work as of July 28, 1959, and imposed a disqualification of five weeks, thereby preventing her from receiving unemployment compensation benefits for said period. He further held that the appellant was not available for the regular work week observed by Spartan Mills and by the textile industry in the area in which she worked.



The claimant appealed from the initial determination of the claims examiner to the Appeal Tribunal of the Commission, and a hearing was held by an Appeals Referee pursuant to Section 68-160 of the Code, at which the testimony of the appellant and her witness was taken. On October 12, 1959, the Appeal Tribunal affirmed the determination of the claims examiner and held that the appellant had been discharged under disqualifying circumstances because she was not available for work as of July 28, 1959.

Pursuant to Section 68-161 of the Code, and within the time allowed by law, the claimant appealed from the decision of the Appeal Tribunal to the Full Commission. This appeal was heard by said Commission on December 16, 1959 and, thereafter, in December 18, 1959, the Commission rendered its decision in which it made findings of fact and conclusions of law affirming the decision of the Appeal Tribunal.

The appellant commenced an action on January 5, 1960, in the Court of Common Pleas for Spartanburg County, for the purpose of obtaining a judicial review of the decision of the Commission. Section 68-165 of the Code. The case was heard by The Honorable J. Woodrow Lewis, Presiding Judge of the Seventh Circuit. Thereafter, by a decree dated June 27, 1960, Judge Lewis affirmed the decision of the Commission, holding that a disqualification had been properly imposed upon the appellant and that, because of the restrictions which she had placed upon her availability for employment, she was unavailable for work within the meaning of the South Carolina Unemployment Compensation Law. Timely notice of intention to appeal to this Court was given by the appellant.

The first question for determination is whether the appellant was able and available for work, under the facts here involved, within the contemplation of the South Carolina Unemployment Compensation Law, or was she discharged for misconduct connected with her work. Th

determination of this question involves consideration of the two sections of the Unemployment Compensation Law which prescribe the general rules of eligibility for unemployment compensation benefits. These are Sections 68-113, which provides for basic conditions which have to be met in order to qualify; and Section 68-114 enumerates a series of disqualifications.

Section 68-113 provides that:

"An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

"(1) He has made a claim for benefits with respect to such week in accordance with such regulations as the Commission may prescribe;

"(2) He has registered for work, \* \* \*

"(3) He is able to work and is available for work.  
\* \* \*

Section 68-114 provides:

"Any insured worker shall be ineligible for benefits:

"(1) Leaving work voluntarily. If the commission finds that he has left voluntarily without good cause his most recent work prior to filing a request for determination of insured status \* \* \*.

"(2) Discharge for misconduct. If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year \* \* \*.

"(3) Failure to accept work. If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission,

(b) to accept available suitable work when offered him by the employment office or the employer.

• • •

At the 1955 session of the General Assembly of South Carolina, Section 68-114 was amended by adding to subdivision (3) thereof a subsection (a) (49 Stats. 490), the following:

"In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, • • •"

It is a fundamental principle of statutory construction that statutes must be construed in the light of the evil they seek to remedy and in the light of the conditions obtaining at the time of their enactment. *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, 204 S. C. 37, 28 S. E. (2d) 535.

The public policy and the purpose of the enactment of the Unemployment Compensation Law of this State is fully set forth in Section 68-36 of the 1952 Code and is declared to be as follows:

"• • • economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide

benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. \* \* \*

In the case of *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, supra, this Court adopted the decree of the lower Court, where with reference to the Unemployment Compensation Act, it was said:

"This statute was passed in 1936, at a time when this State, in common with the entire nation, was suffering from a prolonged depression which had resulted in industry laying off many workers, many of whom were left without the means of obtaining even the barest necessities of life. This unquestionably was the evil which the Legislature was seeking to remedy. Unemployment due to changes in personal conditions of the employee, making it impossible for him to continue on his job had existed for many years, but there is no reason to believe that the evil resulting therefrom was any more pronounced in 1936 than it had been prior to that time. I find nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances.

"It will be noted that one of the remedies proposed by the Legislature in its declaration of State policy was the encouragement of industry to provide more stable employment. In furtherance of this objective, the Act imposed upon the employer the entire burden of creating and maintaining a fund for the payment of unemployment benefits. \* \* \*

"The primary purpose of this provision would be greatly impaired, if not completely defeated, if benefits

were paid to persons who became unemployed, not because the employer could no longer provide them with work but solely because of changes in their personal circumstances. I am constrained, therefore, to conclude that in order to be entitled to benefits under the Act the unemployed individual must be able to and available for the work which he or she has been doing."

It is obvious, therefore, that the fundamental purpose of the Unemployment Compensation Law is to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment and not to provide unemployment compensation where work is available and the employee is able to work and is available for such work.

In *Stone Mfg. Co. v. South Carolina Employment Security Commission, et al.*, 219 S. C. 239, 64 S. E. (2d) 644, it was held that the term "involuntary unemployment" as used in the declaration of policy, "had reference to unemployment resulting from a failure of industry to provide stable employment," and that the statute was not intended "to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances." We quote from the Stone case, the following:

"The courts elsewhere generally recognize that the statute was enacted 'for the benefit of persons unemployed through no fault of their own.'" *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A. (2d) 254, 259. And it has been held that the word 'fault' as used in the declaration of policy is not limited to something that is blameworthy, culpable or wrong. *Moulton v. Iowa Employment Security Commission*, 239 Iowa 1161, 34 N. W. (2d) 211. In *Walter Beldsoe Coal Co. v. Review Board of Employment Security*



Division, 221 Ind. 46, 46 N. E. (2d) 477, 479, the court said: "Appellees say that the word 'fault' means 'something worthy of censure'. We cannot believe that the word as used in the statute was intended to have such a meaning. \* \* \* Thus 'fault' must be construed as meaning failure or volition."

In the case of *Hyman v. South Carolina Unemployment Security Commission, et al.*, 234 S. C. 369, 108 S. E. (2d) 554, this Court held that where a claimant files an application for unemployment compensation benefits, the burden is upon the claimant to show that he has met the benefit eligibility conditions. It was further held that findings of fact made by the Security Commission are conclusive and this Court will not review such findings except to determine whether there is any evidence to support such findings.

The Commission has found that all of the textile plants, including the Spartan Mills, operate six days per week. The six day work week schedule of Spartan Mills was put into effect on July 5, 1959. The appellant remained on her job after notice that such a schedule had been adopted requiring all employees to work six days per week, Monday through Saturday. The appellant did not quit her employment but was absent, without permission, for six Saturdays, and because thereof her employer had to employ a substitute to do her work on Saturdays.

The appellant testified that she was able to work but she was not available for work between sundown on Friday and sundown on Saturday because it conflicted with her religious belief as a member of the Seventh Day Adventist Church. She further testified that she would not accept any employment requiring work during this period of time. She further testified of making application to a number of other textile plants but since they all operated six days a week, she would not be interested in working in any of them. The appellant, being able to work, it must be deter-

mined whether she "is available for work" within the contemplation of the Unemployment Compensation Law.

The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market, which in this case is unrestricted availability for work.

The case of *Unemployment Compensation Commission v. Tomko*, 192 Va. 463, 65 S. E. (2d) 524, was one in which unemployed miners, who were willing to work only three days per week, in obedience to labor union officers' directive, instead of five days per week, as was customary in mining industry, were held not available for work within the Unemployment Compensation Act of the State of Virginia, and hence were not eligible for unemployment benefits. We quote from the cited case, the following:

"As used in the statute, the words 'available for work' imply that in order that an unemployed individual may be eligible to receive benefits he must be willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions not usual and customary in that occupation but which he may desire because of his particular needs or circumstances. Stated conversely, if he is unwilling to accept work in his usual occupation for the usual and customary number of days or hours, or under the usual and customary conditions at or under which the trade works, or if he restricts his offer or willingness to work to periods or conditions to fit his particular needs or circumstances, then he is not available for work within the meaning of the statute.

"The courts have universally held that a claimant who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions,

not usual and customary in the trade, is not 'available for work.' "

In 81 C. J. S., Social Security and Public Welfare, Section 204, at page 304, it is said:

"A claimant may render himself unavailable for work by imposing conditions and limitations as to his employment, so as to bar his recovery of unemployment compensation, since a willingness to be employed conditionally does not necessarily meet the test of availability. Accordingly, it has been held that a claimant who undertakes to limit or restrict his willingness to work to certain days, hours, types of work, or conditions, not usual in his occupation or trade, is not available for work."

The availability for work requirement has been said to be satisfied when an individual is willing, able, and ready to accept suitable work or employment, which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. *Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc.*, 197 Va. 816, 91 S. E. (2d) 642.

In the case of *Judson Mills v. South Carolina Unemployment Compensation Commission, et al.*, supra, it was held that the claimant was unavailable for work where it appeared that, because of considerations personal to her, she became unavailable for employment on the third shift upon which she had been working. The claimant was a textile worker and the mother of four children. During her employment on the third shift a relative took care of her children and when each relative became unavailable for the care of the children the claimant quit her employment and limited her availability to either the first or second shifts. The lower Court and this Court concluded that the claimant was unavailable for employment within the meaning of the Unemployment Compensation Act and

said there is "nothing in the Act itself or in the circumstances surrounding its passage to indicate an intention on the part of the Legislature to provide benefits for a worker compelled to give up his job solely because of a change in his personal circumstances."

In the case of *Hartsville Cotton Mill v. South Carolina Employment Security Commission*, 224 S. C. 407, 79 S. E. (2d) 381, the claimant, a textile worker, and the mother of young children, limited her availability for work to the second shift. She had previously worked on the third shift but had let her cook go and had no one with whom to leave her children. This Court approved an order of the lower Court which held that the claimant's unemployment did not result from the failure of her employer to provide stable employment, but arose out of a change in her domestic circumstances which rendered her unavailable for work. It must follow that while she is unavailable for work due to her own personal circumstances, she falls outside the class which the Act was intended to benefit."

In *Kut v. Albers Super Markets, Inc., et al.*, 146 Ohio St. 522, 66 N. E. (2d) 643, app. dismd. 329 U. S. 669, 91 L. Ed. 500, 67 S. Ct. 86, reh. den. 329 U. S. 827, 91 L. Ed. 702, 67 S. Ct. 186, it appears that a claimant was employed as an order clerk and as a checker in a super market. His employment was terminated by his refusal to continue to perform the work assigned to him. He was referred to two companies, each of which was willing to employ him as a shipping clerk. However, each company refused to accept him for the reason that he refused to work on Saturday, which because of his religious beliefs, he observed as his Sabbath. He filed an application for unemployment compensation and benefits were disallowed because the facts established that the claimant was unavailable for work on any Saturday. The Supreme Court of Ohio affirmed the disallowance of unemployment benefits to the claimant, saying:

"The statute does not designate particular days of the week. It provides that in order to be entitled to benefits a claimant must be 'able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted.' Hence, he must be available for work on Saturday if this is required by his usual trade or occupation, as in this instance.

"Is this provision of the statute a violation of the constitutional right to religious freedom or the right to equal protection of the law? The plaintiff, like everyone else, is free to choose both his religion and his trade or occupation. If in making these voluntary choices he renders himself unavailable for work in his chosen trade or occupation or in any other for which he is reasonably fitted, he, like everyone else who fails to comply with the statutory requirement, is not entitled to unemployment benefits. Hence, the statute is not unconstitutional."

Here, the appellant attempted to limit or restrict her willingness to work to certain days and a certain shift, not usual in the textile industry in the Spartanburg area. She attached restrictions and conditions upon her continued employment with Spartan Mills because of her own particular circumstances and religious creed. It is implicit in the record that it is usual and customary for the textile plants in the Spartanburg area to operate on Saturdays and work was required of their employees on said days. The refusal of the appellant to work on Saturdays did not arise out of anything connected with her employment but was due to the fact that she had become a member of the Seventh Day Adventist Church. Her adherence to the tenets and dogma of the Seventh Day Adventist Church is not blameworthy or censurable, but her election to join that church was a matter personal to her and arose in no respect out of her employment.



Section 68-114 (1) and (2) of the Code, authorizes the Commission, in its discretion, to impose a disqualification in any case where an employee leaves his work voluntarily without "good cause" or is discharged for "misconduct connected with his most recent work." Section 68-114 (3) of the Code, authorizes the Commission, in its discretion, to impose a disqualification if it finds that the insured worker has failed "without good cause" to either apply for available suitable work or to accept suitable work when offered him by the employment office or the employer. It is then provided that in determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals.

The undisputed testimony shows that the appellant had worked in the textile industry and for the Spartan Mills for thirty-five years. There can be no dispute that the appellant was experienced in the textile work in which the Spartan Mills was engaged. She was, therefore, capable and fitted to perform, by past experience and training, the work offered her by her employer.

In the case of *Sweeney v. Unemployment Compensation Board of Review*, 177 Pa. Super. 243, 110 A. (2d) 843, it was held that work offered mine workers which was identical with previous employment fell within the category of "suitable work" contained in statute providing that employee shall be ineligible for unemployment compensation for any week in which unemployment is due to failure, without good cause, to accept suitable work when offered to him by an employer. Likewise, in *Hess Bros. v. Unemployment Compensation Board of Review*, 174 Pa. Super. 115, 100 A. (2d) 120, it was held that work is "suitable work" within the meaning of the Unemployment Compensation Act disqualifying unemployment compensation claims for benefits for failure to accept offer of "suitable work" only if claimant is capable of performing the work.

In the case of *Stone Mfg. Co. v. South Carolina Unemployment Security Commission, et al.*, supra, it was held that the words "good cause" as used in the Unemployment Compensation law contemplates, ordinarily at least, a cause attributable to or connected with claimant's employment. In the case of *Gatewood v. Iowa Iron & Metal Co.*, 102 N. W. (2d) 146, it was held that under a statute disqualifying an employee for unemployment compensation benefits for voluntarily quitting his work without good cause attributable to his employer, the "good cause" for which an employee may voluntarily quit work must involve some fault on the part of the employer. In the case of *Sun Shipbuilding & Drydock Co. v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A. (2d) 254, it was held that where an employee quits employment because habits of his fellow employees are distasteful to him, because work offends his religious or moral principles, or because his family objects to the type of work, does not quit for "good cause" within the meaning of a provision of the Unemployment Compensation Act that employees shall be ineligible for compensation where unemployment is due to voluntarily leaving work without "good cause". In the last cited case, the Court said: "A laudable motive for leaving employment and a 'good cause' within the meaning of the Act are entirely different things."

The appellant asserts that she should not be disqualified because Section 68-114, subdivision 3 (a), of the Code, requires that in determining whether or not work is suitable for an individual, the Commission shall consider the degree of risk involved to her morals. As is heretofore stated, it cannot be said that there is any unsuitability of work in the Spartan Mills in which the appellant has been engaged for thirty-five years, nor can there be any risk to her morals involved in that type of work. When the General Assembly provided that in determining whether any work is suitable for an individual, the Commission

should consider the degree of risk involved to morals, it obviously had in mind work, the character of which would be morally objectionable to any employee. No matter what the faith or creed of the employee was, we think this is made crystal clear because the Commission was required to consider also the degree of risk to the health and safety of the employee. Certainly, this had application to the kind and character of work in which the employee was engaged. The appellant admits that the work she was called upon to perform in Spartan Mills is suitable work and does not involve any moral risk to her on any day except her Sabbath.

The appellant directs our attention to the cases of Tary v. Board of Review, 16f Ohio St. 251, 119 N. E. (2d) 56, and Swenson v. Michigan Unemployment Security Commission, 340 Mich. 430, 65 N. W. (2d) 709, and asserts that the holding in these cases should be controlling. We cannot agree with this contention for these two cases involve very different situations from that with which this Court is now confronted. In neither of these cases did the restrictions imposed by the claimants upon their availability for work have anything to do with the termination of their last employment. In neither case was it made to appear that the restrictions imposed by the claimants were inconsistent with the prevailing standard for similar work in the particular area involved. In the Swenson case, the Court was careful to point out that the Seventh Day Adventists were organized as a religious denomination in 1863 in Battle Creek, Michigan, and there were thousands of Seventh Day Adventists in that city and the community provided them with full time employment. The fact that one of the claimants refused to work from sundown on Friday until sundown on Saturday had no connection with the termination of their employment, because the opinion definitely asserts that the claimants were unemployed "due to lack of work". A careful study of the Swenson case convinces us that the community in which

the claimants worked had adjusted itself to the beliefs of the Seventh Day Adventists and the opinion indicates that the prevailing standard of employment in the locality was consistent with their beliefs.

The Tary case involved a claim for unemployment benefits by a Seventh Day Adventist who refused a job referral involving Saturday work. The Court held, in a four to three decision, that under the statutes as amended, since the decision in the Kut case above referred to, the claimant was not disqualified for benefits since her morals would be affected by having to violate her religious beliefs by working on her Sabbath. There was a strong dissenting opinion filed by Justice Hart, joined in by two other Justices. In our opinion, this dissent is logical and a realistic statement of the rule as we conceive it to be and we apply such to the factual situation here involved. We quote, therefrom, the following:

"In my opinion, the suitability of the work here offered, so far as it related to morals, is not involved. If the work was properly suitable for another person as to morals, it was so suitable for the claimant so far as the character of the work itself was concerned. The claimant chose not to work because of a religious belief concerning the observance of the Sabbath of one of the days of the work week period, which she had a perfect right to do. However, if she thus voluntarily disqualified herself on that account, she disqualified herself under the law to receive unemployment compensation for that same work period, including the day upon which she could not, because of religious belief, work in any event. Incidentally, the position of the claimant reveals an odd type of conscience, the philosophy of which precludes her from working on Saturday but approves her seeking of compensation for that same day of unemployment."

Our attention is also directed to a decision of the Supreme Court of North Carolina, in *Re Miller*, 243 N. C.

509, 91 S. E. (2d) 241, as sustaining the position of the appellant. It appears that Imogene R. Miller was employed by Cannon Mills, Inc., and during the period of her employment she became a Seventh Day Adventist, and because thereof she would not work as a spinner between sundown Friday and sundown Saturday. The Employment Security Commission of North Carolina held that since the employee restricted her services as stated she was not available for work. The North Carolina Supreme Court held that if the interpretation applied by the Commission was correct, then "the rationale of the statute would seem to be that in order to be eligible for benefits a claimant must be 'available for work' at any and all times, night and day, Sunday and week-days alike." If we placed this interpretation upon our unemployment compensation statute, such would be in conflict with Sections 64.4 and 64.5 of the Code, which makes it unlawful for an employer to require or permit an employee, especially a woman, to work in a mercantile or manufacturing establishment on Sunday, except as is provided in Section 64.6 of the 1952 Code.

The authorities cited and relied on by the appellant are either factually or legally distinguishable or are not considered controlling with us.

We conclude, in the light of the facts and circumstances of this case, that since the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works, and by restricting her willingness to work to periods or conditions to fit her own personal circumstances, then she was not available for work within the meaning of our Unemployment Compensation Law. Likewise, we find that the appellant failed to accept, without good cause, available suitable work offered her by her employer.

The appellant asserts that if this Court concludes, as we have hereinbefore, such construction violates her rights



to religious freedom and to the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Article I, sections 4 and 5 of the South Carolina Constitution of 1895.

The right of a person to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed, is guaranteed by the Constitution of this State and by the Constitution of the United States.

However, our Unemployment Compensation Act, as is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.

In *Kuts v. Albers Super Markets*, above cited, it was held that the Unemployment Compensation Act, when construed as not entitling one who refuses employment because of religious belief precluding Saturday work to benefits under the Act, is not unconstitutional as violative of constitutional right to religious freedom. It was further held that the allowance of unemployment compensation to one who refused employment because of religious belief precluding Saturday work, would be unconstitutional as discriminating in favor of such person. Cf. *Carolina Amusement Co. v. Martin*, 236 S. C. 558, 115 S. E. (2d) 273.

It is our conclusion that the decision of the South Carolina Employment Security Commission, as affirmed by the Circuit Court, was correct.

The exceptions of the appellant are overruled and the judgment of the lower Court is affirmed.

TAYLOR, C. J., and LIONEL K. LEGG, and WILLIAM L. RHODES, JR., Acting Associate Justices, concur. BUSSEY, A. J., dissents.

BUSSEY, A. J. (dissenting): It is with reluctance that I find myself unable to concur in the majority opinion herein and feel conscientiously compelled to state my dissenting views thereabout. With only minor exceptions the facts are rather fully set forth in the majority opinion. I shall add thereto only the following facts.

It was stipulated by the parties that the decision of this court in the instant case shall control and be binding in the case of Sally W. Lloyd against the respondents, the issues in that case being the same as in the instant case. It appears from the record that the appellant and the said Sally W. Lloyd were the only two Seventh Day Adventists in the Spartanburg area who were unemployed at the time of the hearing.

From World War II until June 5, 1959 work on Saturdays at Spartan Mills was optional with all employees. When appellant was notified on June 5, 1959 that commencing June 6, 1959 she would be required to work on Saturday, she acquainted her employer with her religious beliefs and declined to report to work on Saturday. There is no question as to her conscientious adherence to the teaching of her church that the Sabbath day begins at sundown on Friday and ends at sundown on Saturday, during which time Seventh Day Adventists do not perform work or labor of any kind. Thereafter, she continued to work for six weeks on the same, identical schedule that she had been working prior to the notice, and then was separated by the employer because of her refusal to work on Saturday. There is nothing in the record to indicate that she had been other than an exemplary employee for thirty-five years and the evidence is that she had never been reprimanded for any misconduct. Prior to her separation from employment, the employer used a substitute for appellant when and as needed on Saturdays.

Appellant's claim for unemployment compensation benefits was filed on July 29, 1959, and up until the time

of the hearing before the claims examiner, she had not been able to find other work, although she had applied for work at three other textile plants in the Spartanburg area, but had been unable to find employment since these plants, like most but not all other textile plants in the area, were at the time operating six days a week, including Saturdays. It appears that a new employee of a textile plant generally is required to work on either the second or third shift, either of which would require work beyond sundown on Friday, and, therefore, it is difficult, if not impossible, for appellant to obtain new shift work, even in a textile plant operating on a five day week, which would not conflict with her Sabbath.

However, the record shows that the appellant was available for the very same work which she had been doing for many years prior to her discharge, and that she was able, willing and available for work in the textile industry or for any other available, suitable work which did not require her to violate her Sabbath. The fact, supported by the record, is that Seventh Day Adventists, including the appellant, are available for work in the labor market generally in the Spartanburg area. The record shows that there are approximately one hundred fifty Seventh Day Adventists in that area and that all of them, with the exception of the appellant and Sally Lloyd, were, at the time of the hearing, gainfully employed but not working on their Sabbath.

Although the exceptions are several in number, there are only two exceptions which I deem necessary for this court to decide, they being as follows:

1. Was the appellant able and available for work within the contemplation of the South Carolina Unemployment Compensation Law?

2. Was the appellant discharged for misconduct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law?

The answers to both of these questions involve the construction to be placed upon various sections of the South Carolina Unemployment Compensation Law, the pertinent provisions of which are set forth in the majority opinion and will not be repeated here.

This court recognized that the statutory law under consideration is to be liberally construed in order to effect its beneficent purpose. *Stone Manufacturing Co. v. South Carolina Employment Security Commission*, 219 S. C. 239, 64 S. E. (2d) 644. The precise questions here involved have not been passed upon by this court. However, for several reasons, little difficulty is involved in arriving at what I deem to be the correct answer to the first question. The instant case is clearly distinguishable from that line of cases wherein an employee is held to be ineligible because the employee has quit work for purely personal reasons totally unrelated to the employment. The appellant here did not quit her employment of long standing and made no change in connection therewith which resulted in her discharge. She was faithfully discharging her duties, just as she had for thirty-five years, in compliance with what had been the established practice of her employer for some fourteen years, and in keeping with her established, sincere and conscientious religious belief. The employer, on the other hand, made the decision to stop the practice of using a substitute, when needed, for the appellant on Saturdays, and forced her to thereafter either work in violation of the Sabbath or be discharged.

In the cited personal convenience case of *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S. C. 37, 28 S. E. (2d) 535, the opinion of then Circuit Judge Oxner, adopted by this court, contains the following statement:

"I am constrained, therefore, to conclude that in order to be entitled to benefits under the act the unemployed individual must be *able to and available for*

*the work which he or she has been doing.*" (Emphasis added.)

The opinion in that case quoted with approval from the opinion in *Brown-Brockmeyer Co. v. Board of Review, etc.*, 70 Ohio App. 370, 45 N. E. (2d) 152, 155, the following language:

"In our judgment subdivision 1 is applicable and determinative under the facts of the instant case. This means capable and available for the work she had been doing."

Here the appellant was admittedly able to do and available for the work which she had been doing for many years, but which work the employer decided change to a schedule which conflicted with her Sabbath.

Even if the foregoing be not a sufficient answer to the first question, it must be borne in mind that the provisions of Secs. 68-113 and 68-114, being in *pari materia*, have to be construed together. Sec. 68-113 prescribes basic conditions which have to be met in order to qualify for benefits, while Sec. 68-114 enumerates a series of disqualifications; together they provide the overall formula governing the right to benefits. To make a claimant eligible only in the event he is ~~filling~~ to accept work without any limitation whatsoever, but to disqualify him under Sec. 68-114 only in the event he should refuse to accept "suitable work" would fix it so that the disqualification would be meaningless since a person willing to take only "suitable work" would always be ineligible in the first instance by virtue of Sec. 68-113.

There is a presumption against inconsistency and where there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by any fair and reasonable interpretation. Locke



v. Dill, 131 S. C. 1, 126 S. E. 747; First Presbyterian Church of York v. York Depository, 203 S. C. 410, 27 S. E. (2d) 573. I, therefore, conclude that the words "available for work" and "able to work and is available for work" as used in the statute mean "able to work and is available for *suitable* work" in the same sense as the words "suitable work" are used in Sec. 68-114.

Section 68-114 (3) (a) expressly commands the Commission to consider the degree of risk involved to one's morals in determining whether or not work is suitable for a particular individual.

It is urged by respondents that when the legislature made the provision about "risks to morals" it had in mind only work the character of which would be morally objectionable to any employee regardless of the moral or religious beliefs of the particular employee. This contention is answered by the specific provisions of Sec. 68-114 (3) (a) which uses the words "*suitable for an individual*, the Commission shall consider the degree of risk involved to *his . . . morals*." (Emphasis added). This clearly shows that the legislature intended that the Commission should take into consideration the moral risk involved to the particular claimant, rather than applying the test of what might or might not be morally objectionable to claimants collectively or to the public in general. It might not be amiss to point out that there is far from a unanimity of opinion on moral issues and that it would be exceedingly difficult, if not impossible, to say in all instances just what would or would not offend the morals of the public in general. It may very well be that the legislature had these fundamental facts in mind when it adopted the specific language of the statute making the risks to the morals of the individual claimant the test.

The respondents further urge that the statute in its entirety must, of course, be construed in the light of the evil which it sought to remedy, and in the light of conditions

obtaining at the time of its enactment. They contend that the factual situation here does not bring this case within the evils sought to be remedied by the enactment of the statute, it being shown that one of the principal objectives of the statute was to "provide more stable employment." They argue that claimant's separation from her employment did not result from the failure of industry to provide stable employment.

Here, the claimant enjoyed stable employment provided by industry, one employer, for a period of thirty-five years, and moreover, stable employment which did not conflict with her religious beliefs. The appellant, in 1959, made no change in her religious faith which led to her discharge, nor did she attach any new condition to her stable employment of many years duration. The decision, the change, was made by the employer when it elected to no longer put a substitute in appellant's place on Saturdays, as it had done in the past. The only change or decision made by anyone at or near the time of appellant's separation from her employment was made by the employer and not by the employee. The employer simply elected not to continue to provide the particular employee the stable employment which had been provided for years.

Moreover, the general language of the declaration of policy contained in Section 68-36 is in the nature of a preamble to the specific provisions of the Act and the specific language of Sec. 68-114 is a very definite limitation on the provisions in the preamble. *Johnson v. Pratt*, 200 S. C. 315, 20 S. E. (2d) 865.

The precise issues involved in this appeal have not previously been before this court. However, the question of whether or not a Seventh Day Adventist is to be deprived of unemployment compensation benefits because of refusal to work on Saturday has been before the Supreme Courts of Michigan, Ohio and North Carolina, all of whom have decided the issue favorably to the contention of the appel-

lant here. No appellate court decision to the contrary has come to my attention.

It is stated in appellant's brief and not challenged by the respondents here that the vast majority of State Commissions which have considered the problem under discussion have decided in favor of claimants such as the appellant here. Reference is made in the brief of appellant to a publication of the Labor Department of the Federal Government entitled Benefits Series Service, Unemployment Insurance, available at the office of the South Carolina Unemployment Security Commission, according to which Service the States of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maryland, Michigan, New York, Pennsylvania, Tennessee, Virginia, Washington and the District of Columbia have held administratively that persons who refuse to work on their Sabbath were not ineligible for benefits.

While none of these authorities is binding upon us, they strongly persuaded me to the view that we should not lightly adopt or adhere to the position taken by the respondents here.

The North Carolina case of *In Re Miller*, 91 S. E. (2d) 241, is more nearly in point with the instant case than any other. That case arose in Rowan County, North Carolina, approximately one hundred miles from Spartanburg. Rowan County has a large textile industry and there was a finding of fact that 95% of the job openings in the textile plants of the area would require work in violation of the Seventh Day Adventist Sabbath. The claimant was a Seventh Day Adventist and was discharged by Cannon Mills because she would not work on her Sabbath, and she was denied benefits on the theory that she was not "available for work". The North Carolina statute is substantially identical with the South Carolina statute. On the facts and statute law almost identical with those in the present case, the North Carolina court had the following to say:

"We do not undertake to formulate an all-embracing rule for determining in every case what constitutes being 'available for suitable work' within the meaning of G. S. Sec. 96-13. The phrase is not susceptible of precise definition that will fit all fact situations. Necessarily, what constitutes availability for work within the meaning of the statute depends largely on the facts and circumstances of each case. However, we embrace the view that work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute. And necessarily the precepts of a religious belief to which one conscientiously and in good faith adheres is an essential part of one's moral standards. Therefore, where, as here, a person embraces a religious faith, the tenets and practices of which impel her to treat as her true Sabbath the period from sundown Friday until sundown Saturday, and to refrain from all secular work during this period, it would offend the moral conscience of such person to require her to engage in secular work during such period."

"We conclude that to have forced the claimant to work on her Sabbath would have been contrary to the intent and purpose of the statute, G.S. 96-13. The claimant, by refusing to consider employment during her Sabbath, did not render herself unavailable for work within the meaning of the statute."

The Supreme Court of Michigan, independently of the morals provision in its statute, which incidentally is substantially identical with that of South Carolina, held Seventh Day Adventists to be entitled to benefits in the case of *Swenson v. Michigan Employment Security Commission*, 340 Mich. 430, 65 N. W. (2d) 709. In that case it was contended that certain claimants were not entitled to benefits because they stated in their applications for benefits that they could not work from sundown on Friday to sundown

on Saturday because they were Seventh Day Adventists. The Supreme Court of Michigan, sustaining the lower court in reversing the Commission, and holding these claimants entitled to benefits, said:

"The law is designed to apply to all situations within its contemplation and the Commission's attitude, if upheld, would completely exclude thousands of citizens of this State from the benefits of the act. That could never have been the intent of the legislature; nor should we so construe the act as to accomplish that result."

The Supreme Court quoted with approval the following from the trial judge in that case:

"To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes of and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them."

While admittedly Seventh Day Adventists are no doubt more numerous in the State of Michigan than they are in the State of South Carolina, and there are before us in the record no figures as to the total number thereof in this State, it does clearly appear that there are approximately one hundred fifty of them in the Spartanburg area alone, all of whom are gainfully employed, other than the individuals concerned with this appeal. In addition to Seventh Day Adventists, there are, of course, many other citizens who conscientiously celebrate Saturday as the true Sabbath and it cannot be said that the legislature in the passage of the Unemployment Compensation Law had any intent or purpose to discriminate against these persons.



Just as was the case in Michigan, these persons have not removed themselves from the labor market as is apparent in that virtually all of them are employed.

In the Ohio case of *Tary v. Board of Review, etc.*, 119 N.E. (2d) 56, the claimant was employed until termination on November 11, 1949, and at no time during her period of employment was she required to work on Saturday. She applied for unemployment benefits and received benefits until she was referred for employment which would have required her to work half a day on Saturday. She refused to accept such employment because of her being a Seventh Day Adventist. The Supreme Court held her entitled to benefits and pointed out the fact that the General Assembly of Ohio by a 1949 amendment had adopted a statutory provision, almost identical with the provisions of our Sec. 68-114(3)(a), dealing with risk to the morals of the individual. In that decision the court distinguished its earlier decision in *Kut v. Albers Super Markets, Inc.*, 66 N.E. (2d) 643, decided prior to the 1949 amendment, and one of the principal authorities relied on by the respondents here.

All of the above cited cases are, in my judgment, extremely well reasoned, logical decisions and of strong persuasive force with us.

The majority opinion seeks to distinguish these cases, but in my humble opinion, they are not truly distinguishable, bearing in mind that the various sections of our law, being in *pari materia*, have to be construed together. The North Carolina case is, on the facts and the law identical with the instant case.

The recent case of *Texas Employment Commission, et al. v. Hays*, 353 S.W. (2d) 924, did not involve a religious or moral issue, but strongly supports the position of the appellant here independently of the moral issue. In that case a high school student was available for employment on a very limited schedule but was available for work in suitable part time employment under the same part time employ-

ment conditions under which he had previously acquired his right to unemployment benefits. The court held that he was entitled to benefits. The holding there is entirely in keeping with the test of availability as laid down by this court in the Judson Mills case, the test being whether the claimant was available for the same work which he had been doing.

The respondents here cite no case in point from this or any other jurisdiction which sustains their position, but would urge this court to disregard the great weight of authority in other jurisdictions and adopt, without precedent, a different rule in South Carolina. They rely principally upon the cases of Stone Manufacturing Co. v. South Carolina Employment Security Commission, *supra*, and Judson Mills v. South Carolina Unemployment Compensation Commission, *supra*, and the Ohio case of Kut v. Albers Super Markets, Inc., *supra*. In addition, the majority opinion cites Hartsville Cotton Mill v. South Carolina Employment Security Commission, 224 S.C. 407, 79 S.E. (2d) 381.

The South Carolina cases are clearly distinguishable. They involved situations where women claimants had voluntarily quit the work which they had been doing for handable but entirely personal/family reasons, unconnected with any religious belief, and in neither instance were they still available for the same work which they had been doing. Here, appellant has been constantly available for the very same work which she had been doing for a long time before she was discharged and was, and is, still, available for any other work, her only limitation being that she would not work on her Sabbath. The appellant here is not unemployed as a result of any decision on her part which removed her either from her previous employment or the labor market generally.

In the Kut case the claimant was an Orthodox Jew who had been employed five days a week and was transferred to a position which required him to work on his Sabbath, to which he objected. His employer then offered to return

him to his former position which required no work on his Sabbath and Kut declined, thus voluntarily making himself unavailable for the same work he had been doing all along, and it was on this basis that the Supreme Court of Ohio was unanimous in denying him the right to benefits. At the time of the Kut case, Ohio did not have the equivalent of our Section 68-114(3)(a) in its statutory law, which fact is specifically pointed out in *Tary v. Board of Review*, supra.

The language quoted in the majority opinion from the Kut case, supra, is, in my humble view, obiter dictum and was clearly so regarded by two members of the Ohio Supreme Court, it being totally unnecessary in that case to go any further than the simple basis upon which the Supreme Court was unanimous in denying Kut the right to benefits.

The cases of *Unemployment Compensation Commission v. Tomko, et al.*, 192 Va. 463, 65 S.E. (2d) 524; *Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc.*, 197 Va. 816, 91 S.E. (2d) 642; *Sweeney v. Unemployment Compensation Board of Review*, 177 Pa. Super. 243, 110 A. (2d) 843; *Hess Bros. v. Unemployment Compensation Board of Review*, 174 Pa. Super. 115, 100 A. (2d) 120; *Gatewood v. Iowa Iron & Metal Company*, 102 N.W. (2d) 146, and *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review*, 358 Pa. 224, 56 A. (2d) 254, are all clearly distinguishable from the instant case, and, in my humble opinion, are simply not in point of the facts.

I shall not attempt to review the factual situation in each of said cases here, but do wish to point out that the case of *Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Board of Review*, supra, involved no issue of an employee quitting because habits of his fellow employees were distasteful to him, because the work offended his religious or moral principles, etc., and any language thereabout in the opinion of the Pennsylvania court is pure

obiter dictum. The facts of that case were simply that the claimant had quit his job solely because he wanted to go into business for himself, in which he failed, and the court simply held that he had forfeited his status as an employee by said action and was, therefore, not entitled to benefits.

With respect to the second question, what has heretofore been said largely disposes of the same. The respondents contend that appellant was discharged for misconduct connected with her work. The evidence shows that she was discharged solely because she would not work on her Sabbath. Since appellant was available for work within the contemplation of the statute, she was not disqualified because she refused to accept work which was unsuitable within the purview of the statute. Therefore, her refusal to perform such work at the direction of her employer was not misconduct connected with her work within the contemplation of the South Carolina Unemployment Compensation Law.

In addition to the foregoing questions, the appellant contends that the ruling of the Commission and the lower court violated the right of claimant to religious freedom and equal protection of the laws guaranteed by the first and fourteenth amendments to the Constitution of the United States and Article I, Sections 4 and 5 of the South Carolina Constitution of 1895.

The majority opinion disposes of these questions by saying that our Unemployment Compensation Act places no restrictions upon the appellant's freedom of religion and by relying upon the obiter dictum language in the per curiam opinion from *Kut v. Albers Super Markets, supra*. This disposition of the constitutional questions does not, to my mind, squarely meet the issues. The appellant does not contend that the Act in itself in any sense is unconstitutional, but does contend that the construction placed thereon by the Commission, the lower court and the majority opinion, is in violation of her constitutional rights to both religious freedom and equal protection of the laws.

It is worthy of note that in addition to two members of the Ohio Supreme Court, the United States Supreme Court regarded the language in the per curiam opinion in the Kut case dealing with the constitutional issues as nothing more than obiter dictum. The United States Supreme Court refused to consider the constitutional questions in the Kut case solely on the ground that the State court's decision was based on a nonfederal ground adequate to support it, the nonfederal ground being that Kut was denied benefits because he refused to return to his former employment where no violation of his Sabbath was involved. 329 U. S. 669, 91 L. Ed. 590, 67 S. Ct. 86.

In my view, this case would be correctly disposed of by reversing the order of the lower court to the end that the cause might be remanded to the South Carolina Employment Security Commission with direction that an award be made to the claimant in accord with the views hereinabove expressed. If we so disposed of the case, there would be no constitutional questions involved. In view, however, of the decision of the majority, the constitutional questions are, of course, still present. I shall not here discuss at length or attempt to decide these constitutional questions but do feel that they are serious enough to require very full consideration before deciding to affirm the judgment of the lower court.



**EXCERPTS FROM SOUTH CAROLINA CODE (1952)**

S. C. Code (1952) (Supp. 1960) sec. 64-4, as amended by Act of April 24, 1953, 48 Stat. at L. 241, and Act of March 24, 1954, 48 Stat. at L. 1717, provides:

**§ 64-4. Employment in textile plants on Sunday.**

"It shall be unlawful for any person owning, conducting or operating any textile manufacturing, finishing, dyeing, printing or processing plant to request, require or permit any regular employee to do, exercise or perform any of the usual or ordinary worldly labor or work in, of, about or connected with such employee's regular occupation or calling or any party [sic] thereof in or about such textile manufacturing, finishing, dyeing, printing or processing plant on Sunday, work of absolute necessity or emergency and voluntary work in certain departments which is essential to offset or eliminate a processing bottleneck or to restore a balance in processing operations and maintain a normal production schedule excepted, and then only upon condition that such employee be paid on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week. But this section shall not be construed to apply to watchmen, foremen and other maintenance and custodial employees. . . .

**§ 64-4.1. Same; during times of national emergency in plants producing goods for defense.**

"During times of national emergency the Commissioner of Labor shall issue permits to industries regulated by § 64-4 permitting such industries to operate on Sunday when sufficient proof is furnished to the Commissioner that the industries are engaged in producing or processing goods for national defense purposes and under government contract. But *no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work* and if any employee should refuse to work on Sunday on account

of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal or be discriminated against in any other manner. Nothing herein contained shall be taken to authorize the production or processing on Sunday of goods other than those being produced or processed for national defense purposes under government contract." (Emphasis supplied.).

S. C. Code (1952) sec. 64-5, provides:

**§ 64-5. Employment of children or women in mercantile or manufacturing establishment on Sunday.**

"It shall be unlawful for any person to employ, require or permit the employment of women or children to work or labor in any mercantile establishment or manufacturing establishment on Sunday. The term "*mercantile establishment*" shall be construed to mean any place where goods or wares are offered or exposed for sale, except cafeterias and restaurants. The term "*manufacturing establishment*" shall be construed to mean any plant or place of business engaged in manufacturing. The Commissioner of Labor and factory inspectors are charged with the enforcement of this section. And the Commissioner and his duly authorized agents or inspectors shall have free access to any place where women or children are employed for the purpose of enforcing compliance with the provisions of this section. Any person who hinders or obstructs the Commissioner, or any of his duly authorized agents or inspectors in the performance of their duties shall be guilty of violating this section. Any person violating any of the provisions hereof shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars, or imprisonment not to exceed thirty days for each offense."

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IN THE  
**Supreme Court of the United States**

October Term, 1962

**No. 526**

**ADELL H. SHERBERT, APPELLANT,**

*versus*

**CHARLIE V. VERNER, ED H. TATUM, ROBERT S.  
GALLOWAY, SR., AS MEMBERS OF SOUTH CAROLINA  
EMPLOYMENT SECURITY COMMISSION, AND SPARTAN  
MILLS, RESPONDENTS.**

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

**MOTION TO DISMISS**

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S. C. Code (1952) (Supp. 1960) sec. 64-5, second paragraph, as added by Act of April 24, 1953, 48 Stat. at L. 242, provides:

**§ 64-5. Employment of children or women in mercantile or manufacturing establishment on Sunday.**

"It shall be unlawful for any person to employ, require or permit the employment of women or children to work or labor in any mercantile establishment or manufacturing establishment on Sunday except that women shall be permitted to work on Sunday during times of national emergency when they are employed by industries engaged in producing or processing goods for national defense and under government contracts in the same manner and under the same conditions as otherwise provided by law. . . . But *no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work* and if any employee should refuse to work on Sunday on account of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal or be discriminated against in any other manner. This section shall not apply to those manufacturing establishments described in § 64-6 [chemical plants requiring continuous and uninterrupted operation]. (Emphasis supplied.)

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IN THE  
**Supreme Court of the United States**

October Term, 1962

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**No. 526**

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**ADELL H. SHERBERT, APPELLANT,**

*versus*

**CHARLIE V. VERNER, ED H. TATUM, ROBERT S.  
GALLOWAY, SR., AS MEMBERS OF SOUTH CAROLINA  
EMPLOYMENT SECURITY COMMISSION, AND SPARTAN  
MILLS, RESPONDENTS.**

---

**ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA**

---

**MOTION TO DISMISS**

---

Respondents, pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss the appeal in the above-entitled case on the grounds (a) that the appeal does not present substantial federal questions and (b) that in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

**OPINIONS BELOW**

The "decree"<sup>1</sup> (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina, is not officially reported. The majority opinion of the Supreme Court of South Carolina and the single dissenting opinion are reported in 125 S. E. (2d) 737.<sup>2</sup> They are officially reported in 240 S. C. 286.

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<sup>1</sup> The "decree" is reproduced verbatim in the Appendix of the Jurisdictional Statement, pages 1a-7a.

<sup>2</sup> The majority and dissenting opinions of the Supreme Court of South Carolina are reproduced verbatim in the Appendix of the Jurisdictional Statement, pages 8a-39a, inclusive.

### **JURISDICTION**

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960. The opinion of the Supreme Court of South Carolina was filed and entered May 17, 1962. No applications for rehearing were filed. Appellant filed notice of appeal August 15, 1960. The jurisdiction of this court on appeal is predicated on 28 U. S. C. Sec. 1257(2).

### **QUESTIONS PRESENTED**

Briefly stated, the questions presented by appellant are whether:

(1) The South Carolina Unemployment Compensation Law, as construed and applied by the South Carolina Supreme Court, violates the First Amendment protection of the Federal Constitution against impairment of the free exercise of religion.

(2) The statute, as applied to the appellant, is so arbitrary and discriminatory as to violate (a) the due process clause of the Fourteenth Amendment or (b) the equal protection clause of the Fourteenth Amendment.

(The first question was raised by appellant in the proceedings leading to this appeal, as was the question whether the application of the statute violated the equal protection clause of the Fourteenth Amendment. However, the record reveals that the question with respect to the due process clause was not specifically or inferentially raised in or passed on by the court below.)

# **STATUTES INVOLVED**

The South Carolina Unemployment Compensation Law provides (S. C. Code (1952) ):

## **SEC. 68-113. BENEFITS. ELIGIBILITY CONDITIONS.**

An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

(3) He is able to work and is available for work

## **SEC. 68-114. DISQUALIFICATION FOR BENEFITS.**

Any insured worker shall be ineligible for benefits:

(2) "Discharge for misconduct." If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period)

(3) "Failure to accept work." If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer . . . such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period)

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals . . . .

### STATEMENT OF CASE

This action was initiated by appellant's petition in the Court of Common Pleas for Spartanburg County, South Carolina (Tr. 20-23) under Section 68-165, S. C. Code (1952) to review and reverse the decision of the State Employment Security Commission that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturdays because of her religious belief as a Seventh Day Adventist and hence was not "available for work" as required by Sec. 68-113, S. C. Code (1952);

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday (Tr. 18-20).

The Court of Common Pleas affirmed the decision of the Commission (Tr. 29-36). The Supreme Court of South Carolina affirmed (Tr. 41-48). Bussey, J., filed a dissenting opinion (Tr. 49-54). No applications for rehearing were filed in the Supreme Court of South Carolina.

**The facts of record are not substantially disputed.—**Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina, as a spool-tender for thirty-five years (Tr. 4, 8) and had been so employed without interruption since August 8, 1938 (Tr. 6, 21). From the end of World War II and until June 6, 1959, Saturday work in this plant had been on a voluntary basis (Tr. 5). Appellant worked only

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\* This subsection (a) was added to section 68-114 by amendment in 1955. S. C. Acts 1955, No. 254, Secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it has not yet been carried into the Code Supplement. Cf. S. C. Code (1952) Sec. 68-114 (Supp. 1960).



five days a week, Monday through Friday, on the first shift —7 a.m. to 3 p.m. (Tr. 8-9).

On August 5, 1957, appellant became a member of the Seventh Day Adventist church (Tr. 13, 6).<sup>4</sup> The religious teaching of that church is that the Sabbath commanded by God commences at sundown Friday evening and ends at sundown on Saturday evening (Tr. 11) and labor or common work during that period is forbidden (Tr. 14). Appellant, as a member of the denomination, shares that belief and in the practice of her religious belief (Tr. 11-12) did not work during the Sabbath after she joined the church on August 5, 1957 (Tr. 13)..

For twenty-two months after so joining the Seventh Day Adventist Church, without working on Saturday, she continued her uninterrupted employment with Spartan Mills until June 5, 1959 (Tr. 5-6). Her employer changed to a six-day week on that day, posting a notice that all employees would be required to work on Saturdays thereafter (Tr. 5-6, 9). (Saturday work was on a voluntary basis until June 5, 1959.) Appellant explained to her employer that she could not work on Saturday because it was her Sabbath, revealed by God (Tr. 12), and thereafter, refusing and failing to work on Saturdays, she missed work on six successive Saturdays (Tr. 6, 10). She was discharged on July 27, 1959 (Tr. 9) because of her refusal to work on Saturday (Tr. 6-12). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were most textile mills in the area (Tr. 10) and she remained unwilling to take any work that would require her to work on Saturday (Tr. 11). Appellant expressed willingness to work in another mill or in any other industry so long as she was not required to work on her Sabbath (Tr. 12).

<sup>4</sup> At the hearing held October 2, 1959 (Tr. 6) she testified that she became a member of the Seventh Day Adventist Church "two years ago the 6th day of this past August" (Tr. 13).

The unquestioned evidence showed that, other than appellant and one other,<sup>3</sup> all of the approximately one hundred and fifty members of the Seventh Day Adventist Church in Spartanburg were gainfully employed in that area and experienced no particular difficulty in obtaining jobs although none worked on the Saturday Sabbath (Tr. 13-14).

Appellant on July 29, 1959, filed her claim with the South Carolina Employment Security Commission for unemployment compensation benefits under the law. Sec. 68.1, *et seq.*, S. C. Code (1952) (Tr. 3-4). The claims examiner found the appellant ineligible under Sec. 68-113(3) because not "available for work" in that her refusal to work on Saturday made her "not available for work during the regular work week observed in the industry and area" in which she had worked (Tr. 4-5). He also held her partially "disqualified" under Sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused absences for six successive Saturdays (Tr. 4-5).

The affirming decision of the Referee or Appeal Tribunal (Tr. 16-18) was affirmed by the appellee Commission (Tr. 18-20).

On the petition of the appellant, the answers of the state commission and of the employer, Spartan Mills, both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed.

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, violated the free exercise of religion clause of the First Amendment included in the Fourteenth Amendment and violated the First Amendment as absorbed into the Fourteenth in

<sup>3</sup> In *Sally W. Lloyd v. Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case.

denying appellant the "protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath" (Tr. 37-38).

The Supreme Court of South Carolina, in its opinion, concluded:

(1) Appellant was ineligible because not "available for work" under Sec. 68-113(3), S. C. Code (1952) in that she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works."

(2) Appellant was properly disqualified for five weeks' benefits, not on the ground assigned by the court below—misconduct under Sec. 69-114(2)—but because under Sec. 68-114(3) she had "failed, without good cause . . . to accept available, suitable work when offered . . . by the employer."

**As to eligibility and disqualification**, the opinion of the Court amply supports the conclusions that the appellant was ineligible for benefits because not available for work, and that the five-week disqualification from benefits was proper for the reason that appellant had failed, without good cause, to accept available suitable work. The opinion is set out verbatim in the Appendix of the Jurisdictional Statement, and the respondents respectfully invite the Court's attention to the well-reasoned majority opinion supporting the construction and application of the statutes challenged here.

**As to constitutional validity of the law as construed**, the assignments of error to the South Carolina Supreme Court raised only two constitutional questions, *viz.*, whether the statute as construed and applied violated appellant's right to religious freedom under the First Amendment of the Federal Constitution, and whether the statute, as construed and applied, violated the equal protection clause of the Fourteenth Amendment. The State Court properly con-

sidered only these two constitutional issues, and dismissed the contentions of the appellant with the statement:

"However, our Unemployment Compensation Act, as (it) is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

Accordingly, the decree of the lower court was affirmed.

### **THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTIONS**

1. The law challenged here does not violate the First Amendment of the Federal Constitution, which, as applied to the States under the Fourteenth Amendment, prohibits laws respecting an establishment of religion or prohibiting the free exercise of religion.

We do not question the constitutional right of an individual to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed. The First Amendment safeguards free exercise of the chosen form of religion. But the Amendment embraces two concepts, freedom to believe, and the freedom to act; and while the first is absolute, the second is not. *Warren v. United States*, 177 F. (2d) 596, cert. den. 339 U. S. 947. The court below recognized and gave effect to this distinction in upholding the unemployment compensation statute and its application against the First Amendment challenge of the appellant:

"However, our Unemployment Compensation Act, as is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

The State's highest Court concluded, in the light of the facts and circumstances of this case, that the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry worked, and by restricting her willingness to work to periods or conditions to satisfy her own personal circumstances, she was not available for work within the contemplation of the State Unemployment Compensation law. The Court likewise concluded that the appellant had failed to accept, without good cause, available suitable work offered her by her employer, thereby supporting a disqualification from benefits of five weeks.

The appellant characterizes this construction and application of the statute as a "substantial penalty on the exercise by appellant of her religious freedom". She also implies that the imposition of the financial burden of the "penalty" is equally as obnoxious as the exaction of a tax as a condition to the exercise of a First Amendment liberty.

These benefits are, at most, non-contractual government benefits. Cf. *Flemming v. Nestor*, 363 U. S. 603, 608-611 (Social Security benefits not akin to accrued property right); cf. also *National Labor Relations Board v. Gullett Gin Co.*, 340 U. S. 361. The factual context in which the Unemployment Compensation statute was here applied had no direct or indirect burden on the freedom of religion guaranteed under the First Amendment. The statute leaves the appellant completely free to choose her religion and to practice it without let or hindrance. It contains no provision that may be construed as impinging upon the freedom of religion. It neither purports to compel nor deny the observance of any religious duty. It is impossible to make even a convincing argument that construing the availability for work standard to deny the eligibility of the appellant for compensation benefits came from any desire of



the religious freedom of the appellant. cf. *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F. (2d) 879, cert. den., 347 U. S. 1013.

*People v. Friedman*, 302 N. Y. 75, 96 N. E. (2d) 184, 186, appeal dismissed 341 U. S. 907, 95 L. Ed. 1345, upheld against constitutional attack a penal statute which forbade the sale of uncooked meat on Sunday. The court, although considering a so-called Sunday law, used reasoning which is apposite here:

"Nor may we say that Section 2147 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a 'law respecting an establishment of religion, or prohibiting the free exercise thereof.' U. S. Const. 1st Amendment. It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. . . ."

The statute challenged here requires that in order to be entitled to benefits a claimant must be available for work in his usual trade or occupation. Hence, as construed by the Court, he must be available for work on Saturday if this is required in his usual trade or occupation. The appellant, like everyone else, was free to choose both her religion and her trade or occupation. If, in making these voluntary choices, she rendered herself unavailable for work in her personal trade or occupation, she, like everyone else who failed to comply with the statutory requirement, was not entitled to unemployment benefits.

The law was enacted under the police power of the State for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. Its fundamental purpose was



to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment. See Section 68-36, Code of Laws of South Carolina, 1952; *Mills v. S. C. Unemployment Compensation Commission et al.*, 204 S. C. 37, 28 S. E. (2d) 536.

The burden was upon the claimant to show that she had met the benefit eligibility conditions, *Hyman v. Unemployment Security Commission et al.*, 234 S. C. 369, 108 S. E. (2d) 554. The appellant's disagreement with the administrative commission and with the State's highest court as to the proper construction and application of the legislative conditions contained in the Statutes cannot rise to the level of a constitutional argument by couching that disagreement in language of impairment of religious freedom, of denial of due process, or of deprivation of equal protection of laws.

The possible deterrent effect of the legislation in question upon the freedom involved is outweighed by the practical necessity of conditioning unemployment compensation to some standard. In the domain of the indispensable liberties guaranteed under the Bill of Rights, this Court has frequently upheld the constitutionality of legislation notwithstanding the possible deterrent effect of the legislation in question upon the freedoms involved. See *American Communications Association v. Douds*, 339 U. S. 382, 398-399, and cases cited therein.

The freedom of religion guaranteed by the First Amendment does not include freedom from all legislation with respect to the appellant's acts and conduct, as distinguished from her beliefs. The State, to provide stable employment opportunities and economic security for its citizens, must be free to impose reasonable conditions upon

unemployment compensation even though the condition may be contrary to the religious scruples of some.

The application of the statutory standards challenged here do not sufficiently impinge upon the appellant's freedom of religion to require the application of a severe standard in upholding its constitutionality. Cf. *Full Salvation Army v. Portage Township*, 318 Mich. 693, 29 N. W. (2d) 297, appeal dismissed, 333 U. S. 851.

The purpose and efficiency of the public welfare legislation here challenged would be greatly impaired, if not completely defeated, if benefits were paid to persons who become unemployed, not because the employer could no longer provide them with work, but solely because of changes in their personal circumstances.

The court below held that the statute, as applied to the **facts and circumstances** of this case, did not interfere with the freedom of religion guaranteed to the appellant by the First Amendment. The decision below turns on its own facts and circumstances prevailing in the State. A review of the fact findings are of no importance save to the litigants themselves. *Rudolph v. United States*, .... U. S. ...., 8 L. Ed. 2d 484. This court could not possibly issue a decision controlling the broad question whether denial of benefits under State Unemployment Compensation laws to a Seventh Day Adventist constitutes a violation of the First Amendment freedom of religion guaranty. Local conditions vary, factual situations vary, unemployment compensation statutes vary. These conditions are further buttressed by the presumption that the legislation challenged here is constitutional.

It is submitted that the assignment of error predicated on the alleged invasion of the First Amendment right of religious freedom presents no substantial Federal question.

2. The appellant also contends that the statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment. The record discloses that the due process question was not specifically raised by the appellant in the administrative proceedings and in the State court proceedings leading to this appeal. The South Carolina Supreme Court did not pass on the due process argument, because that argument was not timely of procedure governing appeals. Rules of the Supreme Court, Rule 4, Sections 6-8, Vol. 7, pp. 429-431, South Carolina Code of Laws, 1952. It is not the province of the highest appellate court of the State to search through the record to find specific constitutional contentions which should have been specifically listed within the assignments of error. *Brady v. Brady*, 222 S. C. 242, 72 S. E. (2d) 193, 194. It is noteworthy that the appellant filed no application for a re-hearing requesting the State Supreme Court to decide the due process question. Rules of the Supreme Court, Rule 17, Section 2.

The respondents respectfully submit that the question of whether the unemployment compensation statute, as construed by the Court, is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment, is not properly before the Court in this appeal.

Nevertheless, it is further submitted that appellant's disagreement with the highest Court of the State as to the proper construction and application of the eligibility standards for compensation benefits cannot rise to the level of a constitutional argument by couching that disagreement in the language of due process. cf. *Psychological Association for Psychoanalysis, Inc. v. University of State of New York*, 8 N. Y. (2d) 197, 168 N. E. (2d) 649, Appeal dismissed 365 U. S. 298. The eligibility of the appellant for compensation benefits was conditioned on her availability

for work, and the State court's construction of that statutory condition, in light of the facts and circumstances of this case, should not be disturbed by this Court merely on the basis of the conclusions contained in the jurisdictional statement of the appellant that the application of the statute was so arbitrary and discriminatory as to violate the due process clause.

The history, scope, language, structure, and nature of the unemployment compensation law, as construed and applied in this case and in earlier cases cited in the majority opinion, do not indicate any punitive design against the appellant or her religious sect. No affirmative disability or restraint was imposed thereunder on the appellant; the statute does not inflict punishment or penalties without due process.

In the case of *Flemming v. Nestor*, 363 U. S. 603, this Court had occasion to construe a section of the Social Security Act which disqualified certain alien deportees from the receipt of Social Security benefits while they were lawfully in this Country. The Court, in considering a due process argument, recognized that the statutory provision was not so lacking in rational justification as to offend due process. The legislation challenged here cannot be deemed irrational or arbitrary when considered in light of the policy and intent of the legislation to provide economic security for employees to combat periodic unemployment conditions. The legitimate police power and public policy involved here greatly overrides any minimal deterrent effect which the statute may exercise on the appellant. The majority opinion in *Flemming v. Nestor*, *supra*, at 363 U. S. 611, states:

"We must conclude that a person covered by the Act has not such a right in benefit payments [as] would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.

"This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of Sec. 202(n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill within the purposes of the Act. Whether wisdom or un-wisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' *Helvering v. Davis, supra* (301 U. S. at 644). *Particularly, when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.*

"Such is not the case here. . . ." (emphasis added.)

On its face and as applied to appellant, the South Carolina Unemployment Compensation statutes were not beyond the allowable range of State action against the Fourteenth Amendment. cf. *Martin v. Walton*, . . . U. S. . . . , 7 L. Ed. (2d) 5, 6. The appellant has utterly failed to show that the application of the Unemployment Compensation statute to the facts of this case manifested a patently arbitrary classification, utterly lacking in rational justification so as to present a Federal question predicated on the denial of due process.

It is, therefore, respectfully submitted, first, that the due process question is not properly before this Court, and, second, that the due process point is so frivolous as not to present a substantial Federal question.

3. The statute, as construed, does not deprive appellant of the equal protection of laws in violation of the Fourteenth Amendment. In cases arising under the Equal Protection clause this court has repeatedly recognized that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.

The traditional test under the Equal Protection clause has been whether a state has made "an invidious discrimination", as it does when it selects a "particular race or nationality for oppressive treatment." *Baker v. Carr*, .... U. S. ...., 7 L. Ed. 2d 663, 701-702, concurring opinion Mr. Justice Douglas; *Skinner v. Oklahoma*, 316 U. S. 533, 541. Universal equality is not the test; there is room for weighting. cf. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489, 99 L. Ed. 563, 573.

Both on its face and as applied to appellant, the South Carolina Unemployment Compensation law does not rise beyond the allowable range of state action under the Fourteenth Amendment. The fact that the statute in its application may result in "incidental individual inequality" does not make it offensive to the Fourteenth Amendment. See *Phelps v. Board of Education*, 300 U. S. 319, 324, 81 L. Ed. 674, 677 (equal protection not denied where administrative resolution grouping salary reductions by classes resulted in some instances of inequality in application); also, *Martin v. Walton*, .... U. S. ...., 7 L. Ed. 2d 5, 6.

The appellant contends that the Unemployment Compensation law, as construed, discriminates between believers of different religious faiths and deprives appellant of equal rights to benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law.



There is argument in the jurisdictional statement of appellant which predicates the denial of equal protection on an *ex parte* construction of the South Carolina Sunday laws. Sunday is set aside as the uniform day of rest for the State, and appellant argues there is a resulting discrimination in the court's application of the unemployment compensation statute to render appellant ineligible for benefits because she refuses Saturday labor. That the day of rest selected by the Legislature does not coincide with the Sabbath of the appellant is no reason to invalidate the unemployment compensation statute as a denial of equal protection of the laws. It cannot be gainsaid that the Legislature may make reasonable classifications for the purpose of legislation. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 340, 55 L. Ed. 369; also, *People v. Berman*, 19 Ill. (2d) 579, 169 N. E. (2d) 108, cert. den. 365 U. S. 804. With reference to equal protection, the Court said in the cited *Lindsley* case:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts

Section 64-2, Code of Laws of South Carolina, 1952, was amended in 1962 by Act No. 850, page 2134, 1962 Acts and Joint Resolutions. The preamble recognizes that "it is in the interest of the moral, physical and mental health and the public welfare of the citizens of South Carolina that a uniform day of rest, insofar as practical, be observed . . ." that some existing statutory provisions for such day of rest were outmoded. So, here, it is the legislature's function to amend the unemployment compensation statutes to reflect changing conditions.

reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Appellant cites three decisions of the Supreme Court: *Everson v. Board of Education*, 330 U. S. 1, 15, 18; *McColum v. Board of Education*, 333 U. S. 203, 210; *Zorach v. Clauson*, 343 U. S. 306, 313, 314, in support of her statement that the "impartiality required of the State with respect to different religions under the First Amendment cannot be less rigid under the equal protection clause of the Fourteenth." These cases are not in point under the facts and circumstances of this case.

The first held that a State may use tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. The second cited case held that the First Amendment is violated by the religious instruction of public school children, during school hours, in tax-supported school buildings. Both cases applied the First Amendment to the Federal Constitution to State action perforce the Fourteenth Amendment. Neither was concerned with an unemployment compensation law or with a Sunday law, and they are, therefore, irrelevant here; nor is the reasoning of them applicable. In *Zorach v. Clauson*, the Court differentiated the facts of it from the *McColum* case and upheld religious instruction of volunteer public school pupils during "released time" in other than school buildings by private instructors. Again, the decision is not in point here.

There is no merit in the contention that appellant has been denied equal protection on the ground that the statute, as construed, discriminates between believers of different

religious faiths. This conclusion of the appellant is not borne out by the facts and circumstances of this case. The record is devoid of any evidence that the court misapplied the legislative standards in determining appellant ineligible for benefits, or that the construction of the statute discriminated against the appellant or her religious sect, in violation of the equal protection clause of the Federal Constitution.

Particularly apposite to the respondent's position that no substantial Federal question is presented by this assignment of error is the Court's statement in the recent case of *Beck v. Washington*, . . . U. S. . . ., 8 L. Ed. (2d) 98, 111, as follows:

" . . . The petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions. . . (or) immunity from judicial error. . . ' *Mihraukie Electric R. & Light Co. v. Wisconsin*, 252 U. S. 400, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 A. L. R. 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

It is therefore respectfully submitted that the statute, as construed and applied to the facts and circumstances of this case, did not so deprive the Appellant of equal protection of law in violation of the Fourteenth Amendment as to present a substantial federal constitutional question.

4. The appellant urges that the question whether unwillingness for religious reasons to take employment involving work on the Saturday Sabbath is protected by the Federal Constitution against surrender as a condition to enjoyment of unemployment compensation is one of broad and continuing general importance to a large number of

citizens. The appellant overlooks that facts and circumstances vary from case to case, unemployment compensation statutes differ from jurisdiction to jurisdiction, and local conditions, both religious and economic, are neither uniform nor static. The questions presented in this appeal affect only the litigants. This is also true of the decision of the South Carolina Supreme Court, whose opinion is expressly restricted to the facts and circumstances of this case. It is not controlling of all factual situations for time immemorial. The Legislature, as representative of the people, is the proper forum to effect changes in the unemployment compensation laws to reflect any change in conditions or attitude of the public, or any popular dissent with the application of the law by the administrative commission or by the courts of the State of South Carolina.

It is not sufficient to present a substantial Federal question that the question abstractly considered presents an intellectually interesting and solid problem since the Court does not sit to satisfy a scholarly interest in such issues, nor for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70.

### CONCLUSION

For the foregoing reasons we do not see any important or substantial federal questions involved in this appeal. There is nothing in the record to warrant a finding that the South Carolina Supreme Court misconstrued or misapplied the State Unemployment Compensation Law, or construed and applied it in such a manner as to deprive the appellant of her First Amendment guarantee of freedom of religion, or that she was deprived of due process or equal protection of laws under the Fourteenth Amendment. In addition, the question with respect to the due process clause of the Fourteenth Amendment was not timely or specifically raised in the proceedings leading to this appeal, and it was not passed on by the State Supreme Court. It is therefore not properly raised in this appeal.

The South Carolina Supreme Court based its decision solely on the facts and circumstances of this case, and only the litigants are affected thereby. The controversy is local in nature, involving only the construction and application of South Carolina Unemployment Compensation legislation. The intrastate application of the State Unemployment Compensation laws should be left to the administrative commission and courts of the State of South Carolina. The record conclusively shows that the appellant was accorded every constitutional right in this case.

It is respectfully submitted that the appeal from the decision of the South Carolina Supreme Court should be dismissed, as it presents no substantial federal questions. It is also respectfully submitted that this case does not

justify the exercise of the discretionary *certiorari* jurisdiction of this court.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

\_\_\_\_\_  
No. 526  
\_\_\_\_\_

ADELL H. SHERBERT, *Appellant*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLO-  
WAY, SR., as members of SOUTH CAROLINA EMPLOY-  
MENT SECURITY COMMISSION and SPARTAN MILLS,  
*Respondents.*

\_\_\_\_\_  
On Appeal from the Supreme Court of South Carolina  
\_\_\_\_\_

**APPELLANT'S OPPOSITION TO MOTION TO  
DISMISS**

\_\_\_\_\_  
The appellees' Motion to Dismiss justifies short  
comment.

1. THE CHOICES APPELLEES LEAVE OPEN TO APPEL-  
LANT CONFIRM THE IMPAIRMENT OF HER RIGHT TO FREE  
EXERCISE OF HER RELIGION.—Appellees emphasize  
that under the South Carolina law a claimant, to be  
entitled to benefits, "must be available for work in his  
usual trade or occupation" (Motion to Dismiss, p. 10).  
They then urge that appellant has a right to choose her

religion and to choose her trade or occupation (Motion, pp. 9, 10) but assert that if in choosing either she "rendered herself unavailable for work in her personal trade or occupation" she is entitled to no benefits (Motion, p. 10). They argue that efficiency of the public welfare legislation would be greatly impaired if benefits were paid to persons who become unemployed "solely because of changes in their personal circumstances" (Motion, p. 12).

This misleadingly implies that appellant became unemployed because of a change in her personal circumstances. In fact the record is clear that, after working only five days a week for a period of twenty-two months during all of which she was a Seventh-day Adventist observing Saturday as her Sabbath, circumstances were changed by her employer's changing its plant to a six-day week. (St. of Juris., p. 6; App., p. 9a; Motion, p. 5).

If, as appellees contend, appellant, to qualify for benefits, is bound to accept the days of work to which her employer changed, as now being the usual and customary days and hours in her usual occupation (Motion, pp. 9, 10), her only escape from ineligibility for benefits is to abandon her religious beliefs. As pointed out by Altman, *Availability for Work* (1950), p. 189, such a limited "voluntary choice" is "hardly consistent with freedom of religion."

2. THERE IS NO DISPUTE AS TO THE FACTS AND THE APPEAL DOES NOT SEEK REVIEW OF THE EVIDENCE.—The South Carolina Supreme Court, in its opinion, was silent on the undisputed evidence that all of the other members of the Seventh-day Adventist Church in the Spartanburg area, some 150 in number, were gainfully

employed in that area and experienced no particular difficulty in obtaining jobs although none worked on the Saturday Sabbath (Tr. 13-14). Appellees admit this fact (Motion, p. 6). There is therefore no dispute as to the facts.

But appellees apparently confuse a review of the evidence relied upon to support ultimate findings of fact in a tax case (citing *Rudolph v. United States*, 370 U. S. 269 (Motion, p. 12)) with review of the constitutionality of a statute as applied in an undisputed fact situation. See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289. Of course, if necessary, where denial of rights under the Federal Constitution is claimed, this Court will reexamine the evidentiary basis for the lower court's conclusions. *Niemotko v. Maryland*, 340 U. S. 268, 271.

3. NO MERE DISAGREEMENT WITH THE STATE COURT'S CONSTRUCTION AND APPLICATION OF THE STATE LAW IS INVOLVED.—Contrary to appellees' repeated suggestion (Motion, p. 11, first full para.; p. 13, third para.) appellant does not here disagree with the State Employment Security Commission or with the State Supreme Court "as to the proper construction and application" of the eligibility standards or legislative conditions contained in the state statute. She recognizes that the State court has the final word on construction of its own statutes. Appellant merely contends that, as so construed and applied the unemployment statute sections involved violate her constitutional rights.

4. THE APPEAL PRESENTS A NOVEL AND SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVING FIRST AMENDMENT RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT.—Whether a state unemployment compensation

law may condition payment of its benefits upon surrender of the right to free exercise of religion guaranteed by the First Amendment is a question of constitutional law never passed upon by this Court and as to which the appellees suggest no controlling precedent.

5. THAT A DETERMINATION HERE CAN SETTLE ONLY THE ISSUES PRESENTED BY FACTS PECULIAR TO THIS CASE IN NO WAY MILITATES AGAINST THE CONTINUING IMPORTANCE OF DECISION BY THIS COURT.—Appellees contend that the question here presented is not important because decision must necessarily be restricted to the facts and circumstances of the particular case and because state unemployment compensation laws vary. (Motion to Dismiss, pp. 12, 19-20)

Of course, this Court can determine only the rights of the litigants before it. *Federation of Labor v. McAdory*, 325 U. S. 450, 461. But a 1945 survey showed unemployment laws of most of the states to have a striking similarity in the aspect here involved. In that year, 34 required that the individual be "able to work and available for work," in six there were minor, and in eleven more substantial variations. Freeman, *Able to Work and Available for Work*, 55 Yale L. J. 123, 124. (Those that require availability for work in "usual trade or occupation" are not so numerous because this so poorly tests attachment to the labor market. A dying industry or an aging claimant may make such willingness irrelevant.)

Appellees' argument merely denies the function of decisions of this Court as precedents in like cases and as bases for analogical reasoning in others. Certainly the considerations deemed to justify dismissal in *Rudolph v. United States*, 370 U. S. 269 and *Rice v.*

*Sioux City Cemetery*, 349 U. S. 70 (cited by appellees (Motion to Dismiss, pp. 12, 20)) find no parallel in the instant case.

In all the States the "available for work" clause has long been the greatest single source of administrative determinations and court decisions dealing with the unemployment compensation statutes. Decision here of the question in this case would, by declaring the law and disclosing the controlling principles, aid substantially in the determination of like and similar cases in the future.

6. THE UNCONSTITUTIONAL CONDITION CASES ARE PLAINLY APPLICABLE.—The appellees complain that appellant did not specifically urge below that the unemployment compensation statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment (Motion to Dismiss, p. 13). It would appear to make little difference whether we urge that the statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment or in greater detail spell out that the statute violates the Fourteenth Amendment, specifically the guaranty of religious freedom included in the First Amendment and incorporated in the "liberty" protected by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U. S. 296, 303), particularly the due process clause thereof which specifically refers to "liberty," and provides: "nor shall any State deprive any person of life, liberty, or property without due process of law".

The decisions cited by appellant (St. as to Juris., pp. 12-13) are pertinent in either event. Neither *Fleming v. Nestor*, 363 U. S. 611, nor *Martin v. Walton*,



368 U. S. 25, upon which appellees rely, involved a First Amendment freedom. They afford no guide for determination of the instant case.

### CONCLUSION

It is submitted that the federal question here presented is important and substantial and the decision thereon of the South Carolina Supreme Court should be reviewed by this Court.

Respectfully,

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December, 1962

Office Supreme Court, U.S.

FILED

FEB 10 1963

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1962

**No. 526**

ADELL H. SHERBERT,

*Appellant,*

*against*

CHARLIE A. VERNER, et al., as Members of the SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS,

*Respondents.*

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**BRIEF OF AMERICAN JEWISH COMMITTEE,  
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and  
AMERICAN CIVIL LIBERTIES UNION  
AMICI CURIAE**

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IN THE  
**Supreme Court of the United States**

October Term, 1962

No. 526

ADELL H. SHERBERT,

Appellant  
against

CHARLENA VERNER, et al., as Members of the SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS.  
Respondents

**BRIEF OF AMERICAN JEWISH COMMITTEE,  
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and  
AMERICAN CIVIL LIBERTIES UNION  
AMICI CURIAE**

**Statement of the Case**

The Appellant, a textile worker, was employed for approximately 35 years by Spartan Mills in Spartanburg, S. C. In 1957 she became a member of the Seventh Day Adventist Church, which has some 150 adherents in the town of Spartanburg. For almost two years after joining the Church, she continued to work at the mills without being required to work on Saturdays. Then her employer changed to a six-day week and announced that all employees would be required to work on Saturdays. Appellant refused to work on six successive Saturdays, and was thereafter dismissed. Her attempts to obtain employment with other mills in Spartanburg failed because all required work on Saturdays.

Appellant's claim filed with the South Carolina Employment Security Commission for unemployment compensation benefits was denied on the ground that she did not qualify under the statute. The statute conditions an applicant's eligibility to receive benefits on his being able to work and being available for work. Unemployment Compensation Law, S. C. Code (1952), Sec. 68-113 (3). The statute further provides that an applicant is ineligible for benefits if he fails "without good cause (a) either to apply for available suitable work, when so directed . . . [or] (b) to accept available suitable work when offered him by the employment office or the employer." *Id.*, Sec. 68-114 (3).

Appellant commenced an action against the members of the South Carolina Employment Commission and Spartan Mills seeking judicial review of the Commission's ruling. Her action was dismissed by the Court of Common Pleas for Spartanburg County, as was her subsequent appeal to the Supreme Court of South Carolina. The latter Court, in a four-to-one decision, reported in 125 SE 2d 737 (May 17, 1962), expressly rejected her claim that denial of unemployment benefits in her case violated the guarantee of freedom of religion under the First and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Constitution of South Carolina. The Court said in that respect that the South Carolina Unemployment Compensation Act

• • • places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.

An appeal was taken to this Court which, on December 17, 1962, noted probable jurisdiction. *Shorbert v. Berner*, 83 S. Ct. 321 (3).

### Interest of the Amici

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance, and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto. . . .

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. It represents a membership of more than 400,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, devoted to the protection of freedom of religion and combatting religious discrimination.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship

and the privileges of freedom which it brings, we seek to guard against the arbitrary deprivation of our birthrights.

The *amici curiae* are gravely concerned with the issues presented by this case. It is a tenet of the Jewish faith, as it is of the faiths of Seventh Day Adventists and Seventh Day Baptists, that the seventh day of the week—Saturday—is the Holy Sabbath. These religions do not accept the shift of the Holy Sabbath from the biblical seventh day of the week (Genesis, 2. 3; Exodus, 16. 23; 20. 8-11; Deut., 5. 12-15), to the first day of the week, Sunday. For a discussion of the shift of the Sabbath from Saturday to Sunday by the major Christian faiths, see CATHOLIC ENCYCLOPEDIA (1907 ed.) Vol. 3, p. 158; Achelis Elisabeth, OF TIME AND THE CALENDAR, Hermitage House, New York (1955) p. 56.

The constitutionally guaranteed right of the free exercise of religion is impaired when members of the groups mentioned, compelled by their religious conscience to refrain from work on their Holy Day, are deprived by the state of unemployment benefits which the law grants generally to other members of the community. Adherents of those groups are in fact penalized for following the precepts of their religion.

We believe that freedom of religion is a basic right of every American and that it must be defended against all attempts at abridgment. Consistent with our purposes, the *amici curiae* are opposed to all manifestations of religious discrimination or impairment of religious freedom, including those involved in this case.

For these reasons we join in filing this brief as *amici curiae* with the consent of the parties.

## **The Question Presented**

This case presents the question whether a state law which denies unemployment insurance benefits to a person who refuses to work on Saturdays for religious reasons, violates the Free Exercise of Religion Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

## **ARGUMENT**

### **POINT I**

**When a state refuses a person the benefits of an established social welfare program solely because of his religious beliefs and conduct, it denies him the freedom of religion guaranteed by the First Amendment.**

#### ***The Free Exercise Clause of the First Amendment***

The early history of our country is replete with examples of the struggle for religious freedom. During the decades preceding the adoption of our Constitution, a major source of conflict in the American colonies centered on freedom of conscience. For the founding fathers, the authors of the Constitution and the Bill of Rights, "religious freedom was the crux of the struggle for freedom in general." *Everson v. Board of Education*, 330 U.S. 1 (1947) (Mr. Justice Rutledge, dissenting, at 34). It was to make certain that religious freedom should remain forever immune from encroachment by the new federal government

that the First Amendment included the twin guarantee against any establishment of religion or any prohibition of the free exercise thereof.<sup>1</sup>

That prohibition originally directed against the federal government has been held equally applicable against the states or any of their political subdivisions. *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940); *Murdock v. Pennsylvania*, 319 U. S. 105, 108 (1943). Today, every one of the fifty states, including South Carolina, has a guarantee of religious freedom in its constitution. South Carolina Constitution, Article I, Sec. 4.; Senate Committee on the Judiciary, **HEARINGS ON PRAYERS IN PUBLIC SCHOOLS AND OTHER MATTERS**, 87th Cong., 2nd Sess. (July 26, Aug. 2, 1962), pp. 268-285.

The Free Exercise of Religion Clause of the First Amendment, like all constitutional guarantees of liberty, protects the individual, be he a member of a group which is a minority or majority in his community, against action by the government. For members of unorthodox groups the guarantee is particularly meaningful because they do not have available to them the apparatus of state government which, in a political democracy such as ours, is controlled by majority vote. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views." *Follett v. McCormick*, 321 U. S. 573, 577 (1944). Time and again this Court has affirmed the right of adherents of unorthodox religions to the protection of the Free Exercise Clause. *Murdock v. Pennsylvania*, *supra*, at 110, 116; *Yicketto v. Maryland*, 340 U. S. 268,

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: \* \* \*



272 (1951); *Fowler v. Rhode Island*, 345 U. S. 67, 69 (1953); *Cantwell v. Connecticut*, *supra*; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943).

### ***Reynolds v. United States***

An early case in which religious freedom was in issue before this Court was *Reynolds v. United States*, 98 U. S. 145 (1878). In that famous case, a member of the Church of Jesus Christ of Latter Day Saints (commonly referred to as the Mormon Church) had been prosecuted and convicted of violating the criminal law of the Territory of Utah by contracting a bigamous marriage. His defense rested upon the claim that his church taught and required its male members to practice polygamy, and that a conviction under the criminal statute would therefore violate his constitutional right to the free exercise of his religion. This Court upheld the conviction on the grounds that "polygamy has always been odious among the Northern and Western nations of Europe . . . and from the earliest history of England polygamy has been treated as an offense against society." This Court, in effect, held that the Free Exercise Clause of the First Amendment does not give a person a license to engage in conduct which has been condemned as "subversive of good order" throughout the entire history of western civilization. Human sacrifice was mentioned by the Court in its opinion as another example of such generally abhorrent conduct which could not be defended under the Free Exercise Clause. Mr. Justice Brennan recently characterized the decision in *Reynolds* as predicated upon conduct "deeply abhorred by society," *Brannfeld v. Brown*, 366 U. S. 599 (1961) (Dissenting Opinion, at 614), and this Court in another recent case

described the *Reynolds* decision as a "narrow exception" to the universal rule that the Free Exercise Clause protects the religious beliefs, practices and activities of unpopular as well as popular religious groups. *Fowler v. Rhode Island, supra*, at 69.

Nowadays issues involving freedom of religion rarely take the form of an outright prohibition by the state of religious activities. The various religions represented in our culture do not require their adherents to engage in conduct "deeply abhorred" by the other members of our society. The free exercise cases which have been the concern of our courts in recent years have involved limitations and restraints which were sought to be imposed on specific religious groups and which had the effect of discriminating against such groups or placing them at a disadvantage.

#### ***Other Cases Involving the Interpretation of the Free Exercise Clause***

In *Cantwell v. Connecticut, supra*, the local authorities sought to restrain members of the Jehovah's Witnesses from soliciting contributions and from house-to-house distribution of religious pamphlets. *Murdock v. Pennsylvania, supra* and *Jones v. Opelika*, 316 U. S. 584 (1942), reversed 319 U. S. 103 (1943); also concerned the distribution of religious literature by Jehovah's Witnesses. The question involved in *Niemetko v. Maryland, supra*, and in *Fowler v. Rhode Island, supra*, was the right of Jehovah's Witnesses to conduct religious meetings in public parks. In *West Virginia v. Barnette, supra*, the issue was the right of children of Jehovah's Witnesses to refuse to participate in flag-salute ceremonies in public schools. In *Kunz v. New York*, 340 U. S. 290 (1951), state authorities attempted to

prevent a Baptist minister from holding a meeting on a public street without a permit. In *Torcaso v. Watkins*, 364 U. S. 488 (1961) the state constitution required an applicant for public office to declare his belief in the existence of God—a requirement which had the effect of excluding from public office those who, for reasons of conscience, could not make such a declaration.

In all those cases, this Court, reversing decisions of the highest state courts, interpreted the restrictive action of the state authorities as violating the Free Exercise Clause of the First Amendment in that such action disadvantaged the appellants because of their religious beliefs or (as in *Torcaso*) disbeliefs. In several of those cases this Court characterized the state limitation as “discrimination.” *Fowler v. Rhode Island*, *supra*, at 69; *Niemetho v. Maryland*, *supra*, at 272.

***The Use of the Taxing Power to Restrict  
the Free Exercise of Religion***

This Court has held repeatedly that the imposition of a tax as a condition for the exercise of one's religion is an unconstitutional restraint upon its free exercise. The same is true of a denial by the state of a financial benefit to a person solely because of his religious beliefs and conduct. In both instances the individual is placed at a disadvantage and suffers a monetary detriment which he would not experience were he not practicing his religion in accordance with his beliefs.

A method used by state authorities to regulate or restrict the exercise of religious activities has been to require the issuance of a license involving the payment of a fee. Such requirement has been held by this Court to be

the imposition of a tax for the exercise of religious activity. Hence, this Court has applied to that group of religious freedom cases the doctrine enunciated in *Grosjean v. American Press Co.*, 297 U. S. 233, 246, 250 (1936), that the taxing power of the state may not be used to restrain the exercise of a constitutional right. The specific right restrained in *Grosjean* was freedom of speech and press, also protected by the First Amendment. In *Speiser v. Randall*, 357 U. S. 513 (1958) this Court again noted the restrictive effect of taxation on speech and reaffirmed the *Grosjean* doctrine. 357 U. S. at 518.

Cases in which this Court struck down the use of the state's taxing power to limit or restrict freedom of religion are *Murdock v. Pennsylvania*, *supra*; *Jones v. Opelika*, 319 U. S. 103 (1943); and *Follett v. McCormick*, *supra*.

The issue in *Murdock v. Pennsylvania*, *supra*, was the constitutionality of a city ordinance which "as construed and applied" required religious colporteurs to pay a license tax as a condition to the pursuit of their activities (*id.* at 110). This Court noted that the form of religious activities involved—visiting people in their homes and offering them religious material—"has the same claim to protection as the more orthodox and conventional exercises of religion." *Id.*, at 109. The power to tax the privilege of engaging in "this form of missionary evangelism" was characterized as "the power to control or suppress its enjoyment." *Id.*, at 112. Consequently, the tax as applied to the Jehovah's Witnesses was held to be a violation of the Free Exercise Clause of the First Amendment.

The facts and the issue in *Jones v. Opelika*, were the same as in *Murdock*. In the first *Jones* decision, 316 U. S.

584 (1942), this Court upheld the conviction of members of the Jehovah's Witnesses who violated city ordinances imposing a license tax upon the sale of religious literature. Upon reargument, however, the Court reversed itself and adopted the opinion in *Murdock*, which was handed down the same day as the second *Jones* decision. 319 U. S. 103 (1943). In the first *Jones* decision, Chief Justice Stone, in his dissent (adopted by the Court in the second *Jones* decision) said:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it. *Jones v. Opelika*, 316 U. S. 584, 608.

In *Follett v. McCormick*, *supra*, a licensing ordinance of the town of McCormick, S. C., was held unconstitutional on the grounds set forth in *Murdock* and *Jones*. In setting aside the conviction of a member of the Jehovah's Witnesses for violating the ordinance, Mr. Justice Douglas, speaking for the Court, stated that "to say that [the Jehovah's Witnesses' preachers] like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." *Follett v. McCormick*, *supra*, at 578.

***The Effect of the South Carolina  
Unemployment Compensation Law***

In the case at bar, the Supreme Court of South Carolina construed the South Carolina Unemployment Compensation Law, Section 68-1, *et seq.*, 1952 Code of Laws of South Carolina, as excluding the Appellant from the unemployment compensation benefits of the statute because she refused to work on Saturdays in accordance with her religious beliefs.<sup>2</sup> That interpretation of the South Carolina statute must be read by this Court "as though the meaning as fixed by the court [below] had been expressed in the statute itself in specific words." *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513. (1933); *NAACP v. Button*, 83 S. Ct. 328, 337 (January 14, 1963); *Hebert v. Louisiana*, 272 U. S. 312, 317 (1926).

Appellant, because of her religious beliefs, was deprived of a statutory right and economic benefit, available generally to citizens of South Carolina.<sup>3</sup> That imposed an economic disadvantage upon her solely because of her religious convictions and her conduct in accordance with such convictions. Thus, as in the cases involving taxes on the exercise of religious beliefs, the individual is disadvantaged because he suffers a monetary loss imposed on him solely because of his religion. It is noteworthy that, as in those cases, the effect of the monetary detriment imposed by the state authority in the case at bar, the denial of unemployment insurance benefits, is felt by members of

2. The fact that the Seventh-Day Adventist Church, to which the Appellant belongs, teaches its adherents that the Holy Sabbath is the Biblical Sabbath which commences at sundown on Fridays and ends at sundown on Saturdays, is not questioned in this case. Nor is the *bona fides* of the Appellant's adherence to those teachings questioned.

3. The statute refers to the unemployment compensation available under the law as the "benefit rights" of individuals. Section 68-112.



a religious group which is small in numbers and not by members of the major religious groups in the community. That is discriminatory state action. (See Point II, *infra*.)

The coercive nature of the denial of unemployment insurance benefits to the Appellant becomes obvious when one speculates about its possible effects upon a claimant in dire financial straits. After all, the intended beneficiaries of an unemployment insurance program are those who, being dependent upon wages, are deprived of their source of income and hence look to the insurance benefits for their subsistence. Such persons, as a result, might seriously contemplate abandoning the conduct prescribed by their religion in order to avoid extreme hardship for themselves or their families.

#### ***Abridgment of Religious Freedom by Denial of a Benefit***

It may be argued that unemployment insurance benefits are merely a "privilege" or a "bounty" and hence denying them to one otherwise eligible for them, because of that person's religion, does not deprive him of a constitutional right. This Court rejected a similar argument in *Speiser v. Randall*, *supra*.

In that case this Court was called upon to determine whether the First Amendment's guarantee of freedom of speech was violated by a statute of the State of California requiring applicants for tax exemption to declare, as a condition for receiving such exemption, that they did not engage in certain activities involving advocacy of political beliefs. The Court held that the applicants' freedom of speech had been violated and said:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. *Id.*, at 518.

The Court also said that

The denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. *Id.*, at 519.

Thus, this Court recognized that one form of unconstitutional interference with free speech is that which is achieved by the denial by the state of a benefit generally available to others. In his concurring opinion, Mr. Justice Douglas, expressed that view as follows:

If the Government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others. When government denies a tax exemption because of the citizen's belief, it penalizes that belief. *Id.*, 536.

Just as the withholding by the state of the benefits of tax exemption was an unconstitutional limitation on free speech (*Speiser v. Randall*), so in the case at bar Appellant's right to the free exercise of her religion was unconstitutionally limited by the State's withholding the benefits of unemployment insurance.

### ***The Clear and Present Danger Doctrine***

We have discussed *supra Reynolds v. United States* in which this Court carved a "narrow exception" out of the universal rule that the free exercise of religion is guaranteed to all individuals by the First Amendment.<sup>4</sup>

Clearly when a religion seeks to require practices which have been found by the community, acting through its governmental apparatus, to be so inimical to the welfare of society as to require suppression for the protection of common welfare, the guarantee of freedom of religion must yield to the duty of the state to protect the common welfare. Freedom of religion cannot serve to protect those who would use it to justify crime or to destroy our constitutional system of government. Obviously, those who seek to practice human sacrifice or the mutilation of the human body in the name of religion cannot claim immunity from punishment or restraint under the First Amendment.

The First Amendment's guarantee of free exercise of religion cannot thus be extended as an absolute to protect activities which would threaten or destroy our society. It was such reasoning that led this Court in *Reynolds v. United States, supra*, to uphold a conviction for polygamy despite the claim that it constituted an exercise of religion.

But here we are faced with no threat to our societal structure if we permit the First Amendment's guarantee of free exercise of religion to be used to protect one whose religion requires observance of the Sabbath on Saturday from the imposition of a severe financial punishment, the denial of unemployment insurance benefits.

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4. *Supra* at pages 7-8.

Nor can it be seriously argued that the Appellant's refusal to work on her Sabbath, Saturday, constitutes a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order," which, according to a *dictum* in *Cantwell v. Connecticut*, *supra*, at 308, might justify state regulation affecting the exercise of religion. At least three state supreme courts have upheld the right of Seventh Day Adventists to receive employment insurance despite their unavailability for work on Saturdays. *Tary v. Board of Review, Bureau of Unemployment Compensation*, 161 Ohio St. 251 (1954); *Swenson v. Michigan Employment Security Commission*, 340 Mich. 430 (1954); *In re Miller*, 243 N. C. 509 (1959).

Moreover, the unemployment insurance agencies in the overwhelming majority of states have interpreted their state statutes as not requiring a forfeiture of benefits where an applicant, for religious reasons, refuses to work on Saturdays. Pfeffer, Leo, *CHURCH, STATE AND FREEDOM*, Beacon Press, Boston (1953) 598.

### ***Denial of Benefits on Non-Religious Grounds***

It may be argued that the statute does not single out for disqualification those who are unavailable for work on a special day because of religious convictions, but that it treats those Seventh Day Adventists, Seventh Day Baptists and Jews who refrain from work on Saturdays, like anybody else who, for whatever reason, is unavailable for work. This argument is based on the language of Section 68-113 (3) of the Unemployment Compensation Law which limits benefits to a person who "is able to work and is available for work . . ." This argument treats alike un-

availability for work on religious grounds and unavailability for other reasons. The first raises an issue involving the free exercise of religion while the second does not. The constitutional guarantee of religious freedom cannot be thwarted merely by restricting some other activities along with those activities which are of a religious nature. That fallacy was exposed by this Court in *Murdock v. Pennsylvania*, *supra*, where an effort was made to save the license tax by pointing out that it affected hucksters and peddlers along with religious preachers. The court said:

The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position. *Id.*, at 115.

The same conclusion was reached by Chief Justice Stone in his dissent in the first *Jones* decision (adopted as the Court's opinion upon reargument, *Jones v. Opelika*, 319 U. S. 103).

The constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose is the dissemination of ideas, and taxing it as business callings are taxed. The immunity which press and religion enjoy may sometimes be lost when they are united with other activities not immune. *Jones v. Opelika*, 316 U. S. at 608.

### ***The Sunday Closing Law Cases***

The 1961 decisions of this Court in the series of Sunday Closing Law cases do not affect the conclusions suggested by this brief. *McGowan v. Maryland*, 366 U. S. 420; *Two Guys from Harrison-Allentown v. McGinley*, 366 U. S. 582; *Braunfeld v. Brown*, *supra*; *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 U. S. 617. In those decisions state legislation requiring cessation of business and labor on Sundays was upheld as a constitutional exercise of the police power for the protection of the public health, safety, recreation and general well-being of the citizens. This Court said that the current purpose and effect of Sunday Closing Laws are "to provide a uniform day of rest for all citizens." *McGowan v. Maryland*, *supra*, at 445. That view was further elaborated in *McGowan v. Maryland*, *supra*, at 450 and in *Braunfeld v. Brown* where this Court said:

... we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation. *Id.*, at 607.



The reasons which this Court advanced above to support the community need for Sunday closing laws have no relevance to the question before the Court in the case at bar. The receipt by the Appellant of unemployment insurance benefits would have no bearing whatever on how the community observed Sundays. The issue here is not whether the Appellant should or should not work on Sunday; but whether when for religious reasons she was unable to work on her Sabbath, she thereby forfeited her unemployment insurance benefits.

There is another essential distinction between Sunday closing laws and the South Carolina Unemployment Compensation Law in terms of the effect those laws have on the free exercise of religion. The thrust of Sunday closing laws is directed against activities on Sundays; they do not prevent a person whose creed requires him to refrain from work on Saturdays from so refraining. The adverse effect of Sunday closing laws on such a person is that he is forced to keep his business closed or is prevented from laboring on Sundays. The fact that such a person is also forced to keep his business closed or is prevented from laboring on Saturdays because of his religious convictions has been characterized by this Court as an "economic disadvantage" which is "solely an indirect burden on the observance of religion." *Braunfeld v. Brown*, *supra*, at 607.

On the other hand, the South Carolina Unemployment Compensation Law declares Appellant disqualified from receiving statutory unemployment benefits as a direct result of her inability to work on Saturdays because of the requirements of her religion. This is more than an "indirect burden on the observance of her religion"; it constitutes a direct interference with the free exercise of her religion.

## POINT II

**When a state refuses a person the benefits of a generally available social welfare program solely because of his religious beliefs and conduct, it denies him the equal protection of the laws guaranteed by the Fourteenth Amendment.**

Our argument under Point I has shown that the withholding of Unemployment Insurance benefits from the Appellant because of her adherence to the precepts of Seventh Day Adventists, constitutes discriminatory state action. The interrelationship of the Equal Protection<sup>5</sup> and Free Exercise Clauses is apparent from several of the decisions discussed above. In *Niemetko v. Maryland, supra*, and in *Fowler v. Rhode Island, supra*, this Court based its decisions on the Free Exercise Clause but noted the discriminatory aspect of the objectionable state action. See Mr. Justice Frankfurter's concurring opinion in *Fowler v. Rhode Island, supra*, at 70.

As in those cases, the state action which interfered with the Appellant's free exercise of her religion also denied her the equal protection of the laws because it discriminated against her solely on the basis of her religion.

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<sup>5</sup> No state shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws.

# **Conclusion**

**The decision of the Supreme Court of South Carolina should be reversed.**

Respectfully submitted,

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**February 15, 1963**

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1962**

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**No. 526**

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**ADELL H. SHERBERT, Appellant,**

**v.**

**CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY,  
SR., as members of SOUTH CAROLINA EMPLOYMENT SEC-  
URITY COMMISSION and SPARTAN MILLS, Respondents.**

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**ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA**

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**BRIEF FOR THE APPELLANT**

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**OPINIONS BELOW**

The "decree" (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina (R. 26-31) is not officially reported. The opinion of the Supreme Court of South Carolina (R. 34-49) and the dissenting opinion (R. 50-62) are reported in 240 S.C. 286, 125 S.E. 2d 737.

## JURISDICTION

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960 (R. 3, 36). The opinion of the Supreme Court of South Carolina, which also constitutes its final<sup>1</sup> judgment was filed and entered May 17, 1962 (R. 34); notice of appeal was filed in that court August 15, 1960 (R. 62). This Court noted probable jurisdiction December 17, 1962 (R. 64). The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (2) (1958).

## QUESTIONS PRESENTED

Whether, where a state unemployment compensation law requires, as a condition precedent to eligibility for unemployment compensation, that an applicant be "available for work" and further provides for disqualification for a stated number of weeks if the applicant fails, without good cause, to "accept available suitable work," and such statute is construed and applied to require unrestricted availability except on Sunday so as to make ineligible and to disqualify a woman who, in the practice of her religious belief, as a member of the Seventh-day Adventist church, is unwilling to work on her Sabbath, from sundown on Friday to sundown on Saturday,—either for her employer, when he, 22 months after she became an Adventist, changed to a six-day work week, or for anyone else,—but who is willing to work at any decent job either in her accustomed textile industry or in any other industry, and who resides in a city where all the 150 other members of her church each week abstain from work during the same

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<sup>1</sup> The covering certificate of the record by the Clerk of the Supreme Court of South Carolina, in pertinent part, states that the "opinion [of the Supreme Court of South Carolina] is the final judgment of this court" (Tr., unnumbered first page).

Sabbath period, but are gainfully employed and experience no particular difficulty in obtaining jobs—Whether the state statute, as so construed and applied,

(1) Violates the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment.

(2) Is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment including the inhibitions of the First Amendment against abridgement of the free exercise of religion.

### **STATUTES INVOLVED**

The South Carolina Unemployment Compensation Law (S.C. Code (1952); now supplanted by S.C. Code (1962)) provides:

#### **SEC. 68-113. BENEFITS ELIGIBILITY CONDITIONS**

An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

(3) He is able to work and is available for work . . .

#### **SEC. 68-114. DISQUALIFICATION FOR BENEFITS**

Any insured worker shall be ineligible for benefits:

(2) "Discharge for misconduct." If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing

not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period) . . .

(3) "Failure to accept work." If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer . . . such ineligibility shall continue for the week in which such failure occurred and for not less than one or more than five next following weeks (in addition to the waiting period) . . .

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals . . .<sup>2</sup>

## **STATEMENT**

Appellant filed her petition in the Court of Common Pleas for Spartanburg County, South Carolina (R. 18-20)

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<sup>2</sup> This subsection (a) was added to section 68-114 by amendment in 1955. S.C. Acts 1955, No. 254, secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it was not carried into the Code until the new S.C. Code (1962) was adopted, January 9, 1962. The sections as they appear in the S.C. Code (1952) are here retained because they are the references of the opinion of the court below. The new Code (S.C. Code (1962)), aside from minor changes in rubrics and interior lettering and numbering, makes no change in the sections of the Unemployment Compensation Law here involved. (See Appendix, *infra*, pp. 33-36.)

The Sunday laws, sections 64-4, 64-5 (S.C. Code (1952)) to which the opinion of the South Carolina Supreme Court refers are set out in the Appendix to the Statement as to Jurisdiction. As carried into the 1962 Code they, and section 64-6 as well, are set out in the Appendix, *infra*, pp. 34-36.

under section 68-165, S.C. Code (1952) to review and reverse the decision of the state Employment Security Commission (R. 16-17) that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturdays because of her religious belief as a Seventh-day Adventist and hence was not "available for work" as required by sec. 68-113, S.C. Code (1952);

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday rendering her ineligible for benefits under sec. 68-114, S.C. Code (1952).

The Court of Common Pleas affirmed the decision of the Commission (R. 26-31). The Supreme Court of South Carolina affirmed by an opinion which also constitutes its judgment (R. 34-49). Bussey, J., filed a dissenting opinion (R. 50-62).

**THERE IS NO CONFLICT IN THE FACTS OF RECORD.**—Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina as a spool-tender for thirty-five years (R. 4-8) and had been so employed without interruption since August 8, 1938 (R. 6). From the end of World War II and until June 6, 1959, Saturday work in this plant had been on voluntary basis (R. 5) and appellant worked only five days a week, Monday through Friday, on the first shift—7 a.m. to 3 p.m. (R. 8).

On August 6, 1957, while employed by Spartan Mills, appellant became a member of the Seventh-day Adventist church (R. 6, 11).<sup>3</sup> The religious teaching of that church is that the Sabbath commanded by God commences at sun-

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<sup>3</sup> At the hearing held October 2, 1959 (R. 6) she testified that she became a member of the Seventh-day Adventist church "two years ago the 6th day of this past August" (R. 117).

down Friday evening and ends at sundown on Saturday evening (R. 10) and labor or common work during that period is forbidden (R. 10, 13). Appellant, as a member of the denomination, shares that belief and in the practice of her religious belief (R. 11, 12) did not work during her Sabbath after she joined the church August 6, 1957.

For twenty-two months after so joining the Seventh-day Adventist church, without being required to work, and not working, on Saturday, she continued her uninterrupted employment with Spartan Mills until June 5, 1959 (R. 5). Her employer changed to a mandatory six-day week on that day, posting a notice that all employees would be required to work on Saturdays thereafter (R. 5, 8). Appellant explained to her employer that she could not work on Saturday because it was her Sabbath, revealed by God (R. 11), and thereafter, refusing and failing to work on Saturdays, she missed work on six successive Saturdays (R. 5, 9). She was discharged on July 27, 1959 (R. 9) solely because of her refusal to work on Saturday, her Sabbath (R. 9, 11). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were most mills in the area (R. 9-10) and she remained unwilling to take any work that would require her to work on her Sabbath (R. 10). Appellant has at all times been willing to work in another mill or in any other industry so long as she was not required to work on her Sabbath (R. 11).

The unquestioned evidence showed that, other than appellant and one other,<sup>4</sup> all of the approximately one hundred and fifty members of the Seventh-day Adventist church in Spartanburg are gainfully employed in that area

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<sup>4</sup> In *Sally W. Lloyd v. Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case (R. 1).



and experience no particular difficulty in obtaining jobs although none works on the Saturday Sabbath (R. 12).

There was no evidence that in the area there were not numerous jobs requiring no Sabbath work and otherwise suitable for appellant; neither was there any evidence to suggest that any such jobs were presently open, or that appellant had been referred to them or had failed to apply or accept any such jobs.

**THE ADMINISTRATIVE DETERMINATIONS.**—Appellant on July 29, 1959, filed her claim with the South Carolina Employment Security Commission for unemployment compensation benefits under the law. Title 68, S.C. Code (1952) (R. 4). The claims examiner found the appellant ineligible for compensation benefits under sec. 68-113 (3) because not “available for work” in that her refusal to work on Saturday made her “not available for work during the regular work week observed in the industry and area” in which she had worked (R. 4-5). He also held her “disqualified” under sec. 68-114 (2) for a period of five weeks because discharged for misconduct—her unexcused Saturday absences (R. 4-5).

The affirming decision of the Referee or Appeal Tribunal (R. 14-16) was affirmed by the appellee Commission (R. 16-17).

**THE JUDICIAL REVIEW.**—On the petition of the appellant (R. 18-20), the answers of the state commission (R. 20-22) and of the employer, Spartan Mills (R. 23-25), both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed (R. 26-31).

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, vio-

lated the free exercise of religion clause of the First Amendment as absorbed into the Fourteenth Amendment and as well violated the same amendment by denying appellant the protection and benefits available to those who observe Sunday as the Sabbath (R. 33).

In its opinion and judgment here under review, the South Carolina supreme court held (R. 34-49):

As to initial eligibility for unemployment benefits under § 68-113(3) regard must be had for the declared public policy of the Unemployment Compensation Law (§ 68-36, S.C. Code (1952)) establishing as the fundamental purpose protection against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment (R. 29). It held that the purpose of the "available for work" test was to determine whether a claimant was actually and currently "attached to the labor market" (R. 41, 42), and held that this required "unrestricted availability," except for Sunday (R. 41, 48).

The court also held that "available for work" means "available for suitable work"<sup>5</sup> (R. 41, 42) but that "suitable work" includes work in the employee's usual occupa-

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<sup>5</sup> The court thus accepted appellant's contention that "available for work" in § 68-113(3) must mean the same as "available for suitable work" in the disqualification provision of § 68-114(3). It would be senseless to protect against disqualification for refusal of available work on the ground that it was not "suitable", and yet leave a claimant ineligible initially because unwilling to take the same work because not protected by § 68-113(3) against the necessity of being willing to take work regardless of whether it was "suitable". Cf. *In re Miller*, 243 N.C. 509, 91 S.E.2d 241 (1955). But the South Carolina court refuses to give "suitable" the content that appellant contends results from § 68-114(3)(a), requiring consideration of degree of risk to the claimant's morals in determining whether work is "suitable". The South Carolina court holds that this does not contemplate reference to the religious convictions of the individual but refers only to permissible rejection of "work, the character of which would be morally objectionable to any employee" (R. 46).

tion under the usual and customary conditions at or under which the trade works (R. 39, 41-44).

The court concluded appellant was not "available for work" within the meaning of § 68-113(3) as so construed because she was unwilling to work in her usual occupation for the usual and customary days and hours under which the textile industry works (R. 44, 48). Ignoring that the change of days by her employer was the occasion for the disruption, it held her refusal to work on Saturdays (and impliedly her unemployment) arose, not from anything connected with her employment, but because she "attempted to limit or restrict her willingness to work to certain days and a certain shift not usual in the textile industry in the Spartanburg area." (R. 44, 48).

As to disqualification for five weeks benefits (somewhat redundant in this case) the court relied on § 68-114(3), S.C. Code (1952) and its holding that "available suitable work" as there used permitted of no consideration of the effect of Saturday work on appellant's morals because of her belief in the Saturday Sabbath from sundown Friday to sundown Saturday (R. 44, 46). It concluded that she had failed to accept, without good cause, available suitable work offered by her employer, within the meaning of § 68-114(3) (R. 48-49).

### **SUMMARY OF ARGUMENT**

I. Under the First Amendment the freedom of religious belief is absolute and cannot in any way be invaded by either Federal or State legislation. *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642; *Braunfeld v. Brown*, 366 U.S. 599, 603. In the exercise of that absolute right, appellant believes that it is the commandment of God that she abstain from labor on the Sabbath—from sunset Friday to

**sunset Saturday.** The South Carolina Unemployment Compensation Law, as construed and applied in this case, conditions appellant's eligibility for benefits thereunder upon her being willing to accept work on Saturday and disqualifies her for her refusal to accept a job involving work on Saturday. In effect this requires her to repudiate her religious belief by professing a willingness to do something in conflict with the tenets of her church. This is not mere regulation of conduct. It invades the sphere of belief and intellect. Conditioning of unemployment compensation benefits on surrender of constitutional rights has the same deterrent effect as a denial of a tax exemption or denial of right to public office. *Speiser v. Randall*, 357 U.S. 513; *Torcaso v. Watkins*, 367 U.S. 488. The law, therefore, violates appellant's absolute freedom of belief under the First Amendment. *West Virginia State Board of Education v. Barnette*, *supra*.

II. Even if the requirement of unrestricted availability on the Saturday Sabbath be regarded as regulation of conduct, the statute, as so construed and applied here, nevertheless violates the "free exercise" clause of the First Amendment. The stated purpose of the requirement of the challenged sections of the law that claimants be "available for work" is to insure that the claimant is genuinely attached to the labor market and that his unemployment is involuntary and the result of failure of industry to supply stable employment. Here the unquestioned evidence shows that 150 other co-religionists, observing the same Sabbath, are nevertheless gainfully employed in the same locality and experience no difficulty in obtaining jobs. Appellant is willing to accept a job in any industry. The requirement of Sabbath work, construed into the statute by the state court, in effect prohibits appellant's free exercise of religion without any compelling reason. Other and

more effective means are available to determine whether a claimant is attached to the labor market and thus achieve the end purpose of the requirement of "availability for work". One way would be to require a showing that services such as those offered by plaintiff, restricted by non-labor on the Sabbath, are being offered and hired in the local labor market. Because the statute, as construed and applied, is unnecessarily broad and destroys appellant's free exercise of religion, no compelling reason justifies the subordination of appellant's constitutional rights. *Schneider v. State*, 308 U.S. 147. *Shelton v. Tucker*, 364 U.S. 479, 488-489; *Louisiana v. N.A.A.C.P.*, 366 U.S. 293, 296-297.

III. The state court construes the "unrestricted availability" requirement not to include requirement of Sunday work. This is based on Sunday laws that prohibit textile and other manufacturing establishments from working employees on Sunday. But such statutes contain an exception as to work on Government contracts during emergency periods and expressly state that no Sunday work shall be required of an employee who is "conscientiously opposed to Sunday work". This confirms that the Sunday exemption is based on religious grounds. The First Amendment, as part of the Fourteenth, permits no partiality, but requires absolute neutrality on the part of the State as between religions. *Everson v. Board of Education*, 330 U.S. 1, 15-16; *Zorach v. Clauson*, 343 U.S. 306, 313. The Unemployment Compensation Law of South Carolina is therefore unconstitutional because of this discrimination between religions.

### ARGUMENT

The South Carolina Unemployment Compensation Law, as here construed and applied violates the First Amendment as absorbed into the due process clause of the Fourteenth Amendment by unduly infringing her religious freedom



and by arbitrarily discriminating in favor of those who observe Sunday as a day of worship.

We believe the state court erred in its narrow construction of the South Carolina statute, particularly in its refusal to give section 68-114(3)(a), S. C. Code (1952), full application so as to require the Commission to consider the degree of risk involved to appellant's morals in requiring her to be available for work on her Saturday Sabbath.\* See *Tary v. Board of Review*, 161 Ohio St. 251, 119 N.E. 2d 56; *In re Milley*, 243 N.C. 509, 91 S.E. 2d 241. We recognize, however, that the state court's interpretation of the South Carolina statute becomes the statute in this Court. *Hebert v. Louisiana*, 272 U.S. 312, 317.

As to appellant's assertion that the First and Fourteenth Amendments were violated by the statute, as construed, the state court held (R. 49):

"However, our Unemployment Compensation Act, as is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

This disregards the established principle of unconstitutional conditions.

So far as the decision below rests upon conclusions of fact as to appellant's willingness to work in her usual occupation, this court is not bound thereby and remains free to reexamine the evidentiary basis for such conclusions.

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\* For brevity, the Seventh-day Adventist Sabbath, commencing with sunset on Friday evening and ending with sunset on Saturday evening, will sometimes be hereinafter referred to as the "Saturday Sabbath" or "Sabbath".



*Niemotko v. Maryland*, 340 U.S. 268, 271; *Feiner v. New York*, 340 U.S. 315, 316.

## I

**THE SOUTH CAROLINA LAW, AS CONSTRUED AND APPLIED, VIOLATES THE FIRST AMENDMENT BECAUSE IT VIOLATES THE INDIVIDUAL'S FREEDOM OF BELIEF.**

The portion of the First Amendment here involved is addressed primarily to action or conduct. It provides:

“Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof. . . .”

Appellant relies on the “free exercise” clause. But this Court has long recognized that the clause affords protection of the right to believe, a right that is absolute in nature.

In *Cantwell v. Connecticut*, 310 U.S. 296, 303, the Court stated:

“The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. *Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.* On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.* Conduct remains subject to regulation for the protection of society.” (Emphasis supplied.)

Appellant here relies primarily on the first concept—her freedom to believe. She is claiming no right affirmatively to act or to do anything that conflicts with the interests of others. She does assert her absolute freedom of belief and, in the exercise of that freedom, her right to be let alone on her Sabbath. She complains only that the state law, by the coercion of withheld unemployment compensation, invades the realm of her religious belief and requires her, in derogation of that belief and contrary to the tenets of her church, not only to profess a willingness to work on Saturday, but as well to accept a job involving work on Saturdays.

**A. Coercion to work or to express willingness to work on appellant's Sabbath violates her absolute freedom to believe.**

Because her freedom of religious belief is absolute, appellant may not be coerced by penalties, fines or other sanctions to do acts or engage in conduct that violates her conscientiously held views as to her duty to God.

In *Davis v. Beason*, 133 U. S. 333, 342, this Court recognized that the First Amendment—

“was intended to allow every one under the jurisdiction of the United States . . . to exhibit his sentiment in such form of worship as he may think proper, not injurious to the equal rights of others.”

Even before the First Amendment rights were expressly recognized as part of the liberties protected by the Fourteenth, this Court in *Meyer v. Nebraska*, 262 U. S. 390, said (p. 399):

“Without doubt, it [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individ-

nal to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>7</sup>

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, the Court held that the absolute freedom to believe (*Cantwell v. Connecticut*, 310 U. S. 296, 303) necessarily means, as a corollary, that no one can be compelled affirmatively by word or act to do an act in conflict with his religious belief. Speaking for the Court, Mr. Justice Jackson said (p. 642):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (Emphasis supplied.)

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<sup>7</sup> Forbearance from labor on the Saturday Sabbath in the religious belief that it is the commandment of God is plainly a form of worship. "Worship" is defined as "Act of paying divine honors to a deity; religious reverence and homage; adoration or reverence paid to God, a being viewed as God, or something held as sacred from a reputed connection with God." Webster, *Unabridged Dictionary* (2nd ed.), p. 2955.

In *Watson v. Jones*, 13 Wall. 679 (1869), the rule was stated as follows (p. 728):

“In this country the *full and free right to entertain any religious belief*, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.”

In *Everson v. Board of Education*, 330 U. S. 1, the opinion points out (p. 11) that the First Amendment embodies the common conviction that—

“... individual religious liberty could be achieved best under a government which was *stripped of all power* to tax, to support, or otherwise to assist any or all religions, or *to interfere with the beliefs of any religious individual or group*.” (Emphasis supplied.)

In the same case, it was said (p. 15) that the “establishment of religion” clause means, *inter alia*,—

“Neither [a state nor the Federal Government] can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

and at p. 16, the same opinion of the Court states

“On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or

lack of it, from receiving the benefits of public welfare legislation."

In the more recent Sunday law cases, the same absolute nature of the freedom to believe (in contrast with the conditioned nature of the freedom to act) was recognized. In *Braunfeld v. Brown*, 366 U. S. 599, the Court took as its initial premise (p. 603):

"Certain aspects of religious exercise cannot in any way be restricted or burdened by either federal or state legislation."

There, distinguishing the *Barnette* case on the same ground, the Court said (p. 603):

"... nor does it [the Pennsylvania Sunday law] force anyone to ... say or believe anything in conflict with his religious tenets."

In *Torcaso v. Watkins*, 367 U. S. 488, the Court did not even pause to mention, much less evaluate, the alleged competing interests of the State in preserving assurance of moral accountability by its public officers. It was enough to say (p. 495):

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'."

As exemplified in the flag salute case, the basic liberty of conscience or liberty of religious belief includes as a minimum the negative liberty or right not to be compelled by speech or act, to profess a disbelief in one's religion, or thereby to profess another religious belief. This is the very

essence of religious freedom. In the first flag salute case (*Minersville District v. Gobitis*, 310 U. S. 586) Mr. Justice Frankfurter, speaking for the Court, even while upholding the salute requirement, said (p. 594):

"But, because in safeguarding conscience we are dealing with interest so subtle and so dear, every possible leeway should be given to the claims of religious faith."

Because the South Carolina law here involved coerces appellant by affirmative act to repudiate her religious belief, it unconstitutionally impairs the guaranteed freedom.<sup>9</sup>

**B. Denial of unemployment compensation benefits under a public welfare program constitutes prohibited coercion.**

Referring to appellant's assertion that denial of unemployment compensation benefits under the circumstances violated the Federal Constitution, the state court held (R. 49):

"However, our Unemployment Compensation Act, as is hereinbefore construed, places no restriction upon

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\* The requirement that appellant be willing to work on her Sabbath, to the extent that it resulted in her actually working on that day, would appear as well to impair her freedom of association, i.e. to join with her co-religionists on that day for public devotions to God and instruction in the teachings of her church. Since ministerial imparting of instruction in doctrines of facts and moral precepts is so essential a part of the exercise of religion, this right is also apparently recognized as a freedom that can be impaired only by the most compelling secular interests. *Davis v. Beason*, 133 U. S. 333, 342; *Minersville District v. Gobitis*, 310 U. S. 586, 593, 600; *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 460-461.

<sup>9</sup> Because expressly held not to be included within the scope of religious freedom, the compulsion to bear arms in defense of the United States does not trench upon liberty of conscience. *Hamilton v. Board of Regents*, 293 U. S. 245; *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 632. Neither is there here involved any grave and immediate danger to health of the community such as justified the compulsory vaccination in *Jacobson v. Massachusetts*, 197 U. S. 11; cf. *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639.



the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

This appears to be nothing more than the assertion of right to impose an unconstitutional condition on enjoyment of unemployment compensation benefits.

In *Frost Trucking Co. v. Railroad Comm.*, 271 U. S. 583 this Court held (p. 593-594):

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."

This rule was applied in *Jamison v. Texas*, 318 U. S. 413. Refusing to apply *Davis v. Massachusetts*, 167 U. S. 43, the Court there held (p. 416)

"But one who is rightfully on a street which the State has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word."

Whether a right or only a privilege, public employment may not be conditioned on surrender or waiver of the constitutional protection against arbitrary denial of the

right of association (*Wieman v. Updegraff*, 344 U. S. 183, 191-192); or of the right to due process. *Slochower v. Board of Education*, 350 U. S. 551, 556-557.

In *Speiser v. Randall*, 357 U. S. 513, this Court held (p. 518):

“It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a ‘privilege’ or ‘bounty’, its denial may not infringe speech.”

To the same point is *Torcaso v. Watkins*, 367 U. S. 488, 495:

“The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.”

Courts in other jurisdictions have applied the same principle as to withholding of an annuity (*Steinberg v. United States*, 143 C. Cl. 1, 163 F. Supp. 590, 591 (1958)); of use of school buildings (*Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 545-546, 171 P. 2d 885 (1946)); of privilege of public housing (*Lawson v. Housing Authority of Milwaukee*, 270 Wis. 269, 273-278, 70 N.W. 2d 605, cert. denied 350 U. S. 882); and of unemployment insurance (*Syrek v. California Unemployment Insurance App. Bd.*, 54 Cal. 2d 519, 532, 354 P. 2d 625, 632 (1960)).

The denial of unemployment compensation could well

result in the destitution against which the program was intended to guard. To some the deterrent effect on their exercise of religious freedom might be greater than would be a sentence to jail. The latter would carry with it at least some sort of housing and food.

It is submitted that, having embarked on its program of unemployment compensation, whether participation therein by an unemployed claimant be termed a "privilege," a "right" or a "bounty," South Carolina may not dispense those benefits in an arbitrary way nor exact surrender of the basic freedom to believe, even though, in other contexts, it might exact minor curtailment of the religious freedom to act.

## II

### **THE REQUIREMENT OF UNRESTRICTED AVAILABILITY FOR WORK ON APPELLANT'S SABBATH IN EFFECT PROHIBITS THE FREE EXERCISE OF RELIGION BY APPELLANT AND CANNOT BE JUSTIFIED BY ANY SUBORDINATING INTEREST OF THE STATE.**

Even if appellant's claimed right to non-action on her Sabbath be regarded as conduct subject to regulation and control in the public interest, the Unemployment Compensation Law of South Carolina, as here construed, violates the First Amendment.

As construed by the state court, section 68-113(3), S. C. Code (1952) requires that appellant, to be initially eligible for unemployment benefits, must be willing to work on her Sabbath; section 68-114(3) requires that she, to avoid disqualification, accept a job involving otherwise suitable work, if offered, even though it involves her working on her Sabbath (R-37, 44, 46).

Statutory compulsion, inducement or influence to register

an attitude of mind contrary to her conscientiously held belief as to her duty to God, or actually to work on her Sabbath in violation of her religious belief, would in practical effect destroy the very substance of religious freedom for appellant. The right to observe the Sabbath by abstaining from labor is of the essence. Take that away or stifle it, and there is no freedom of religion so far as a Saturday Sabbatarian is concerned. Most Sunday-observing Christians probably feel as strongly with respect to their right similarly to refrain from labor in observance of Sunday as the Lord's Day.

Decisions of this Court establish that conduct constituting the practice of religion and not inherently harmful or immoral, may not be wholly prohibited; neither may such conduct, by otherwise permissible state regulation, be unduly or unnecessarily infringed. *Lovell v. Griffin*, 303 U.S. 444; *Cantwell v. Connecticut*, 310 U.S. 296, 304-305. That a state measure is non-discriminatory in form is unimportant. If it stifles or penalizes exercise of religious freedom, it is nevertheless bad. Dissenting opinion in *Jones v. Opelika*, 316 U. S. 584, 600, 608, adopted as opinion of the Court, 319 U. S. 103; *Murdock v. Pennsylvania*, 319 U. S. 105, 115. Power of the State to regulate or impair a First Amendment freedom is the exception rather than the rule (*Herndon v. Lowry*, 301 U. S. 242, 258) and mere rational relation between the statutory enactment and the evil to be cured is not enough to justify even minor limitations on the full enjoyment of the First Amendment freedom. *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639; *Thomas v. Collins*, 323 U. S. 516, 530. Hence, a general law to advance legitimate secular goals of the State, where it touches, even tangentially, on First Amendment freedoms of the individual, must be highly selective and narrowly drawn to prevent the supposed evil; any

deterrent to exercise of religious freedom, even if incidental or indirect, must have appropriate relation to the purpose of the law and be essential to its accomplishment. *Schneider v. State*, 308 U. S. 147, 164; *Martin v. Struthers*, 319 U. S. 141, 147-148; *Talley v. California*, 362 U. S. 60, 64, 66; *Louisiana v. N.A.A.C.P.*, 366 U. S. 293, 297.

In applying these principles to the South Carolina law, the circumstances must be weighed and the substantiality of the reasons advanced in support of the questioned provisions must be carefully appraised. *Schneider v. State*, *supra*, 161; *Martin v. Struthers*, *supra*, 144; *Marsh v. Alabama*, 326 U. S. 501, 509.

Measured by these standards, the requirement of "availability for work" on the Sabbath that the state court has read into the statutory provisions here involved (§§ 68-113(3) and 68-114(3)) cannot be sustained, and their enforcement violates the First Amendment.

**A. The stated object of the statutory provisions here involved is to test whether a claimant is genuinely and currently attached to the local labor market.**

The opinion of the state supreme court quotes the formal declaration of policy of the South Carolina Unemployment Compensation Law (sec. 68-36, S. C. Code (1952)) (R. 38). The opinion then states (R. 39):

"It is obvious, therefore, that the fundamental purpose of the Unemployment Compensation Law is to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment . . . .

Since the law is an "experience rating" type under which the employers bear the entire burden, they are protected against being required to pay compensation benefits to those

who become or remain unemployed merely because of personal circumstances.

The opinion then introduces the interpretation that has created the issues in this case. It states (R. 41):

"The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined *whether or not the claimant is actually and currently attached to the labor market*, which in this case is unrestricted availability for work." (Emphasis supplied.)<sup>10</sup>

The meaning of "attached to the labor market" is further spelled out as follows (R. 42):

"The availability for work requirement has been said to be satisfied when an individual is willing, able, and ready to accept suitable work or employment, which he does not have good cause to refuse, that is, *when he is genuinely attached to the labor market*. Unemployment Compensation Commission of Virginia v. Dan River Mills, Inc., 197 Va. 816, 91 S.E. (2d) 642. (Emphasis supplied.)

It thus appears that the "basic purpose" or object of the requirements of "available for work" in § 68-113(3) and "available for suitable work" in § 68-114(3) (both being read by the court as "available for suitable work" (R. 41, 42)) is stated to be the provision of a test whereby to determine whether or not a benefits claimant is genuinely

<sup>10</sup> It is here that the court below also reads into "available for work" the court's construction of that phrase as meaning "unrestricted availability", which in turn requires willingness to work on Saturday, but not on Sunday (R. 41, 48)



and currently "attached to the labor market."<sup>11</sup> The indicated evil thereby sought to be remedied is the abuse of the law by persons who become unemployed, not because of inability of industry to provide stable employment but solely because of changes in the personal circumstances of the employee.

**B. The requirement of willingness to work on Saturday is not essential to accomplish the object of the law or to prevent the evil it seeks to remedy.**

The requirement of availability for work on the Saturday Sabbath is read into the statute by the state court as part of the "unrestricted availability" for work which it, also by construction, adds to the requirements of §§ 68-113(3) and 68-114(3) for eligibility and avoidance of disqualification, respectively (R. 41, 43, 44). But this is all in extension of "available for work" as it appears in the

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<sup>11</sup> In *Reger v. Administrator Unemployment Compensation Act*, 132 Conn. 647, 46 A. 2d 844, 846, it is stated: "A labor market for an individual exists when there is a market for the type of services which he offers in the geographical area in which he offers them."

In *Freeman, Able to Work and Available for Work*, 55 YALE L. J. 123, 124, it is explained:

"The availability requirement is said to be satisfied when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. Since, under unemployment compensation laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual exists when there is a market for the type of services which he offers in the geographical area in which he offers them. 'Market' in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of appropriate job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which he is offering them. (Footnotes omitted)

statute.<sup>12</sup> This phrase, in turn, is conceded by the Court to be merely a means of implementing the basic purpose of the law—to provide a test by which to determine whether a claimant “is actually and currently attached to the labor market” (R. 41).<sup>13</sup>

<sup>12</sup> The state court also introduced into the statute, by construction, as another equivalent of “available for work” the requirement of availability for work in the claimant’s usual occupation for the usual and customary number of days and hours and usual and customary conditions (R. 41, 42, 43, 44). It held appellant failed to satisfy this requirement (R. 48).

The fallacy lies in looking only to what other employers in the same trade had established as “usual”. The opinion thus evades the impact of the record facts. Only the change to a six-day week by the employer, Spartan Mills, in June, 1959 made the six-day week “usual” in the textile industry so far as appellant was concerned. As the dissenting Judge Bussey pointed out (R. 54, 59), appellant made no change in religious faith and attached no new conditions to the terms upon which she had enjoyed stable employment for many years. She had been observing Saturday as the Sabbath since at least as early as 1957. It was the employer that made the change. Thus, it was the employer that elected not to continue the stable employment. One of the objects of the statute is to relieve the employee of the insecurity of unemployment attributable to the inability of the employer to provide stable employment.

So far as the judgment below may be regarded as resting on the ultimate fact conclusion that appellant’s unemployment resulted from her changing the usual days or hours of her usual occupation to fit her own personal circumstances, it cannot stand. All of the evidential facts are clearly to the contrary. Furthermore, if construed to require that claimant always be available for her old job, if offered, or for a similar job in the same occupation, grave doubts as to validity of the law under the due process clause would arise. This would tie the worker, not only to his last occupation but also, where the job is still open, to his last employer. Unemployment compensation was never intended as a throw-back to serfdom. See Freeman, *Able to Work and Available for Work*, 55 YALE L. J. 123, 125-126.

In any event, it is plain that with “available for work” construed to include the requirement of availability for the usual occupation during the usual hours and usual days, particularly with the peculiar meaning attached to “usual” by the court below in this case, the challenged statutory provisions have the same effect and are subject to the same constitutional objections that apply to “unrestricted availability”.

<sup>13</sup> Curiously, after stating that the “available for work” requirement is merely a test to determine whether or not the claimant is “actually and

But "unrestricted availability" or availability for work on Saturday, on this record, fails to further or aid the accomplishment of the purpose of the statute. It fails because it would exclude from eligibility as persons attached to the labor market at least 150 individuals who admittedly are presently performing services in the Spartanburg market although not available for work on Saturday. (R. 12, 17). Appellant is willing to accept a job in any industry (R. 11). That their services, with restriction against Saturday work, are being so performed establishes that there is a labor market in Spartanburg for such services so restricted against Saturday work. Attachment to the labor market is thus demonstrated by persons who cannot show "unrestricted availability"—because unavailable on their Saturday Sabbath—and would, if they became claimants fail to satisfy the objectionable "unrestricted availability" requirement read into the statute by the court below and here challenged.

Because the avowed object of the subsections here challenged is to verify that a claimant is genuinely and currently attached to the local labor market, and because the requirement of unrestricted availability on every day but Sunday (R. 41, 48) so signally fails as a test of such attachment, it is manifest that this requirement of availability on Saturday Sabbath—read into the statute by the state court and here challenged by appellant—is neither essential nor helpful in furthering or advancing that avowed object of the subsections.

Freedoms guaranteed by the First Amendment occupy a preferred position (*Murdock v. Pennsylvania*, 319 U. S. 27, 40). "currently attached to the labor market" (R. 41), the opinion of the state supreme court does not even mention the uncontradicted evidence that as to at least 150 persons (there are probably many more of other religions such as the Orthodox Jewish faith) non-availability for Saturday work does not remove them from the labor market (R. 12). The Employment Security Commission did note the fact but gave it no weight (R. 16-17).

105, 115; *Saia v. New York*, 334 U.S. 558, 562; *Koracs v. Cooper*, 336 U.S. 77, 88) or retain a "momentum far respect" (*Koracs v. Cooper*, 336 U.S. 77, 95 (concurring opinion)) that requires the subordinating interest of the State to be "compelling" before legislation in derogation of those freedoms can be sustained. *Sweezy v. New Hampshire*, 354 U.S. 234, 265; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463; *Bates v. Little Rock*, 361 U.S. 516, 524; Legislation, such as that here involved, that so directly and gravely impairs and abridges a First Amendment freedom can be sustained only if narrowly drawn to achieve the purported objective or to prevent the supposed evil. *Schneider v. State*, 308 U.S. 147, 164; *Cantwell v. Connecticut*, 310 U.S. 296, 307; *Martin v. Struthers*, 319 U.S. 141, 147-148; *Talley v. California*, 362 U.S. 60, 64, 66. Particularly is this true, where, as here, the purpose of the legislation of the State can be achieved by a measure less broad and sweeping but narrowly drawn to avoid penalizing exercise of First Amendment rights. *Schneider v. State*, 308 U.S. 147, 162, 164; *Shelton v. Tucker*, 364 U.S. 479, 488-489; *Louisiana v. N.A.A.C.P.*, 366 U.S. 293, 296-297.

**C. Unobjectionable constructions of provisions would with equal efficiency achieve the object of the law here challenged.**

It is plain that the objectives and purpose of the legislation here involved and particularly the stated purpose of the requirements ("available for work") in § 68-113(3) and ("available for suitable work") § 68-114(3) could and would be fully achieved if those requirements were limited or construed to make the test of eligibility or disqualification a test identical with the stated basic object of the requirements: Whether the claimant is actually, currently and genuinely attached to the labor

market in the area in which the claimant offers his services. Of course, another alternative clearly open to the State, and probably involving no conflict with the religious freedoms of claimants would be the interpretation of section 68-114(3)(a), S.C. Code, (1952), now section 68-114(3)(b), S.C. Code (1962), to require the Employment Security Commission to give consideration to the subjective effect on the morals of the individual claimant of the days and hours of a particular job in determining whether or not it is "suitable work." See *Tary v. Board of Review*, 161 Ohio St. 251, 119 N.E. 2d 56 (1954); *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241 (1956).<sup>14</sup>

It is submitted that there is no compelling justification for the deterrent effect of the challenged provisions of the South Carolina Unemployment Compensation Law on the free exercise of religion by appellant.

### III

#### **THE REQUIREMENT OF UNRESTRICTED AVAILABILITY ON SATURDAY AND THE EXCEPTION AS TO SUNDAY MAKES THE LAW ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE FOURTEENTH AMENDMENT.**

The state supreme court, after stating that "available for work" means "unrestricted availability" (R. 41), noted that this does not mean availability on Sundays because such interpretation of the statute "would be in conflict with Section 64-4 and 64-5 of the Code, which makes it un-

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<sup>14</sup> Rejecting the ground of decision in these cases, the court below said (R. 46): "When the General Assembly provided that in determining whether any work is suitable for an individual, the Commission should consider the degree of risk involved to morals, it obviously had in mind work, the character of which would be morally objectionable to any employee."

lawful for an employer to require or permit an employee, especially a woman, to work in a mercantile or manufacturing establishment on Sunday, except as is provided in Section 64-6 of the 1952 Code" (R. 48).

Reference to the sections cited by the Court (Appendix, *infra*, pp. 34-35, 36) shows that under section 64-4 the operators of textile plants are prohibited from permitting any regular employee to "perform any of the usual or ordinary worldly labor or work in" such employee's calling on Sunday. During times of national emergency industries engaged in production for national defense and under Government contracts may, by permit, operate on Sunday—

"But no employee shall be required to work on Sunday as above provided who is conscientiously opposed to Sunday work; . . ."

Section 64-5 similarly prohibits the employment of women or children in mercantile or manufacturing establishments on Sunday but by proviso allows women to work on Sunday on defense contracts during times of national emergency, again with the further proviso:

"no employee shall be required to work on Sunday as above provided, who is conscientiously opposed to Sunday work. . . ."

It is submitted that the due process clause of the Fourteenth Amendment, with the content added in transmitting the principles of the First Amendment (*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639) is violated by the arbitrary and discriminatory effect of the Unemployment Compensation Law as so construed by the state court.

To require Saturday Sabbatarians to repudiate their



religious belief in the sanctity of Saturday as the day appointed by God to be devoted to reverence and worship, and to be willing and ready to work on Saturdays, while leaving Sunday observers free of any similar requirement as to Sunday work constitutes an arbitrary discrimination that violates the due process clause of the Fourteenth Amendment.

The language of the South Carolina statutes upon which the South Carolina court relies as requiring the exemption makes it plain that the exemption is based, not on secular considerations directed to obtaining the benefits of a unitary day of rest but rather on a classification that discriminates between persons on the basis of their religious beliefs. This discrimination in the statutes on which the state court relies to justify the Sunday exception, particularly as to women, from its rule of "unrestricted availability" (R. 41, 48) emphasizes that the Saturday Sabbath observer is by the Unemployment Compensation Law, as construed, deprived of the equal protection of the laws under the First and Fourteenth Amendments. *Niemotko v. Maryland*, 340 U.S. 268, 272. These brook no partiality on the part of the State but require absolute neutrality. *Everson v. Board of Education*, 330 U.S. 1, 15-16; *McCullum v. Board of Education*, 333 U.S. 203, 210; *Zorach v. Clauson*, 343 U.S. 306, 313; *Engel v. Vitale*, 370 U.S. 421, 443 (concurring opinion).

It is submitted that the South Carolina Unemployment Compensation Law is invalid as applied because it is arbitrary and discriminatory in violation of the due process clause of the Fourteenth Amendment.

## CONCLUSION

It is respectfully submitted that the Unemployment Compensation Law as here construed and applied cannot constitutionally be given effect, and the judgment of the South Carolina Supreme Court should be reversed.

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## APPENDIX

The South Carolina Unemployment Compensation Law (Title 68, secs. 68.1-68.404 (S. C. Code (1962))) in pertinent part provides:

• • • • •

§ 68-113. Conditions of eligibility for benefits.—An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

• • • • •

(3) He is able to work and is available for work, but no claimant shall be considered available for work if engaged in self-employment of such nature as to return or promise remuneration in excess of the weekly benefit amounts he would have received if otherwise unemployed over such period of time.

• • • • •

§ 68-114. Disqualification for benefits.—Any insured worker shall be ineligible for benefits:

• • • • •

(2) *Discharge for misconduct.*—If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request, and continuing not less than five nor more than the next twenty-two consecutive weeks (in addition to the waiting period), as determined by the Commission in each case according to the seriousness of the misconduct, . . .

• • • • •

(3) *Failure to accept work.*—(a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, ineligibility shall continue for a period of five weeks (the week in which such failure occurred and the next four weeks in addition to the waiting period) as determined by the Commission according to the circumstances in each case . . . .

. . . . .

(b) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence.

. . . . .

Title 64 of the South Carolina Code (1962), "Sundays, Holidays and other Special Days" provides:

§ 64.4. Employment in textile plants on Sunday.—It shall be unlawful for any person owning, controlling or operating any textile manufacturing, finishing, dyeing, printing or processing plant to request, require or permit any regular employee to do, exercise or perform any of the usual or ordinary worldly labor or work in, of, about or connected with such employee's regular occupation, or calling, or any part thereof in or about such textile manufacturing, finishing, dyeing, printing or processing plant on Sunday, except work of absolute necessity or emergency and except voluntary work in certain departments which is essential to offset or eliminate a processing bottleneck or to restore a balance in processing operations and main-

tain a normal production schedule, but then only upon condition that such employee be paid on the basis of one and one half the amount of the usual average day wage or salary earned by such employee during other days of the week. But this section shall not be construed to apply to watchmen, firemen and other maintenance and custodial employees. The term "*regular employee*" as used in this section shall be construed to mean any person who usually or ordinarily works as much as eight hours per week or more in any such textile manufacturing, finishing, dyeing, printing or processing plant, whether employed and paid by the job, by the piece, by the hour or on a salary basis. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars.

During times of national emergency the Commissioner of Labor shall issue permits to industries regulated by this section permitting such industries to operate on Sunday when sufficient proof is furnished to the Commissioner that the industries are engaged in producing or processing goods for national defense purposes, and under government contract. The sense of this paragraph is that it shall be applicable only during periods of national emergency and to those industries expressly enumerated. *But no employee shall be required to work on Sunday as above provided who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious or physical objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner. Nothing herein contained shall be taken to authorize the production or processing on Sunday of goods other than those being produced or processed for national defense purposes under government contract. (Emphasis supplied.)*

§ 64-5. Employment of children or women in mercantile or manufacturing establishments on Sunday.—It shall be unlawful for any person to employ, require or permit the employment of women or children to work or labor in any mercantile establishment or manufacturing establishment on Sunday. *Provided*, that women shall be permitted to work on Sunday during times of national emergency when and if they are employed by industries engaged in producing or processing goods for national defense and under government contracts in the same manner and under the same conditions as otherwise provided by law. *Provided, further*, that no woman shall be permitted to work in the manner herein provided unless and until the industries engaged in producing goods for national defense purposes and under government contract have first submitted to the Department of Labor, proof sufficient to establish their national defense status, whereupon the Commissioner of Labor is directed to issue a permit authorizing the employment of women on Sunday, subject, however, to other conditions and circumstances provided by law. *Provided, further, however, that no employee shall be required to work on Sunday as above provided, who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious or physical objections he or she shall not jeopardize his or her seniority rights by such refusal or be discriminated against in any other manner. This section shall not apply to those manufacturing establishments described in § 64-6. (Emphasis supplied.)*

. . . . .

§ 64-6. Exceptions for chemical plants requiring continuous operation.—The provisions of §§ 64-2 to 64-5 shall not apply to manufacturing establishments or employees thereof when such establishments in the nature of their business involve chemical manufacturing processes requiring, of necessity, for a normal production schedule continuous and uninterrupted operation. In such industries a work week in excess of forty hours and a workday in excess of eight hours shall not be permissible except when the provisions



of the Fair Labor Standards Act are complied with. The exemption herein provided shall not apply to or affect cotton, woolen or worsted manufacturing, finishing, dyeing, printing or processing plants and such plants and industries shall be controlled by § 614.

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IN THE

**Supreme Court of the United States**

October Term, 1962

No. 526

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SUPREME COURT, U.S.

ADELL H. SHERBERT,

*Appellant,*

*against*

CHARLIE V. VERNER, *et al.*, as Members of the South  
CAROLINA EMPLOYMENT SECURITY COMMISSION and  
SPARTAN MILLS,

**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA,  
AMERICAN JEWISH CONGRESS, JEWISH LABOR  
COMMITTEE AND JEWISH WAR VETERANS OF  
THE USA, AS AMICI CURIAE**

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IN THE  
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**ADELL H. SHERBERT,**

*Appellant.*

*against*

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CAROLINA EMPLOYMENT SECURITY COMMISSION and  
SPARTAN MILLS.**

---

**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA,  
AMERICAN JEWISH CONGRESS, JEWISH LABOR  
COMMITTEE AND JEWISH WAR VETERANS OF  
THE USA, AS AMICI CURIAE**

---

**Interest of the Amici**

This brief is submitted on behalf of the Synagogue Council of America, the American Jewish Congress, the Jewish Labor Committee and the Jewish War Veterans of the U. S. A.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:



Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The American Jewish Congress is a national organization of American Jews, founded by Rabbi Stephen S. Wise, Supreme Court Justice Louis D. Brandeis, Federal Judge Julian Mack and others, to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy.

The Jewish Labor Committee is a national organization of trade unions with a substantial Jewish membership and Jewish labor-oriented community organizations concerned with the civil rights of all groups, the strengthening of democratic forces in the world, and the advancement of Jewish culture and the Jewish community.

The Jewish War Veterans of the U. S. A., the oldest active veterans organization in the United States, is dedicated to support of the national defense and to the extension to all citizens of the democratic rights guaranteed by the United States Constitution.

Since our members observe as their holy day the same day observed by the appellant in this case and this Court's

determination of the issue raised will affect their rights to unemployment compensation benefits, we obviously have a direct interest in the controversy before this Court. But our interest extends far beyond the narrow confines of this particular controversy. Were the Sabbath involved in this case the first rather than the seventh day of the week, we would be equally concerned. Those we represent are devoted to the preservation of religion and the protection of civil rights, and, we believe, affirmance of the decision of the court below would be inimical to the cause of religion and prejudicial to the cause of civil rights.

As organizations engaged in the teaching and practice of religion we are concerned about a decision which would compel an unemployed, financially distressed worker to choose between the sacrifice of her religious convictions and the unemployment benefits which may be desperately needed to carry her and her family through a period of unemployment. Since we are committed to the American democratic system, based as it is upon the principle of religious freedom, we are concerned about a decision which, by compelling the unemployed worker to choose between religion and economic relief, in effect deprives him of his religious freedom.

For these reasons we have sought and obtained the consent of counsel for the parties to the submission of this brief *amici curiae*.

### Statement of the Case

Plaintiff-appellant had been employed at the Spartan Mills in Spartanburg, South Carolina, as a spool-tender for some thirty-five years. From the end of World War II until June, 1959, work in the plant on Saturdays was voluntary, and plaintiff had worked only five days a week. In August, 1957, plaintiff became a member of the Seventh-day Adventist church. It is not disputed that her conversion was entirely bona fide and that her membership in the church and adherence to its doctrines and beliefs are likewise bona fide.

According to the doctrines and beliefs of the Seventh-day Adventist church, as of Judaism, the biblically commanded Sabbath is the seventh, rather than the first day of the week. As in Judaism, too, in the Seventh-day Adventists' faith, the Sabbath begins at sundown on Friday and ends at sundown on Saturday. During this period engagement in work, business or other secular pursuits is forbidden.

Since Saturday work at Spartan Mills was voluntary until June, 1959, the plaintiff had no difficulty in adhering to her religious beliefs from August, 1957, until June, 1959. At the latter date, however, a six day week became mandatory and the plaintiff's refusal to violate her religious convictions by working on Saturday led to her dismissal. She thereupon applied to the South Carolina Employment Security Commission for unemployment insurance benefits. However, her refusal to accept any job which would require her to work on Saturday led to a determination by the Commission that she was ineligible for benefits because

she was not "available for work" within the meaning of the South Carolina statute (S. C. Code (1962) Sec. 68-113(3)), even though she expressed her willingness to work in any other mill or in any other industry so long as she was not required to work on her Sabbath.

The decision of the Commission was upheld by the Court of Common Pleas for Spartanburg County, and its decision in turn was affirmed, over a strong dissent, by the Supreme Court of South Carolina. Asserting that her constitutional rights were violated by this determination, the plaintiff appealed to this Court which, on December 17, 1962, noted probable jurisdiction.

### **Constitutional Provisions Involved**

The First Amendment to the United States Constitution provides in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The first section of the Fourteenth Amendment to the United States Constitution provides, in part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Summary of Argument

A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions does not labor on Saturdays deprives him of free exercise of his religion. Even if the deprivation be deemed indirect and affecting a privilege rather than a right, it is nevertheless within the compass of the First Amendment. It is constitutionally permissible only if clearly and immediately necessary for the avoidance of a grave danger to the public welfare, and only if no method not infringing upon religious liberty is available to avoid the danger. This test cannot be met in the present case, and accordingly the disqualification of the plaintiff unconstitutionally deprived her of rights secured by the First Amendment.

Moreover, disqualification of a worker who for reason of religious conviction will not work on Saturdays while no such disqualification is imposed upon those who for the same reason will not work on Sunday constitutes a law respecting an establishment of religion in violation of the First Amendment and a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

## ARGUMENT

### POINT I

**Disqualification from unemployment insurance benefits of one who for reasons of conscience will not work on his Sabbath unconstitutionally deprives him of his freedom of religion.**

We submit that the South Carolina statute, construed and applied to entail forfeiture of benefits for refusal to work on Saturday, restricts the religious liberty of those whose conscience requires them to abstain from labor on that day. The sanction imposed by the state for observing Saturday as holy time is certainly more serious economically to an unemployed worker than the imposition of a license tax for preaching which this Court has held to constitute a restriction upon religious liberty. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Follet v. Town of McCormick*, 321 U. S. 573 (1944).

We cannot agree with the statement of the Supreme Court of South Carolina that the statute as construed and applied "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience" (Statement as to Jurisdiction, p. 25a). Only in the narrowest and most unrealistic sense can it be said that the State of South Carolina is not forcing the appellant to violate her Sabbath. An unemployed worker, without a source of livelihood, can hardly be said to be exercising full freedom of choice. While the compulsion may be indirect, it is quite substantial.



The impairment of the religious freedom of the appellant herein and others in her class is far more direct than that suffered by the Sabbatarians in the Sunday law cases. *Braunfeld v. Brown*, 366 U. S. 599 (1961); *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961). In those cases, this Court was unanimous in holding that the religious freedom of the seventh-day observers was restricted by the operation of the Sunday laws. A majority of the Court held that this restriction was nevertheless permissible and did not violate the First Amendment. But that a restriction on the free exercise of religion was involved is evident from the fact that the Court dismissed the free-exercise claim in the non-Sabbatarian cases (*McGowan v. Maryland*, 366 U. S. 420 (1961); *Two Guys from Harrison-Allentown v. McGinley*, 366 U. S. 582 (1961)), while it did weigh the claim when asserted by the Sabbatarians.

Nor is the claim of violation of the First Amendment adequately met by asserting that unemployment benefits are in the nature of a privilege rather than a right. Even if there is a constitutional distinction between rights and privileges in respect to governmental action, and even if unemployment benefits properly belong in the latter category (which is far from certain), nevertheless the grant of a privilege may not be conditioned upon the forfeiture of a right secured by the First Amendment.

If receipt of unemployment benefits is a privilege, so too is attendance at public school. Yet, the privilege of attendance may not constitutionally be conditioned upon the child's violating his conscience by saluting the flag or pledging allegiance to it. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). Tax exemption is certainly a privilege rather than a right, yet a state

may not condition the grant of tax exemption upon the taking of a loyalty oath. *Speiser v. Randall*, 357 U. S. 513 (1958). Appointment to the office of notary public is likewise a privilege rather than a right, yet it may not constitutionally be conditioned upon the applicant's taking an oath that he believes in the existence of God. *Torcaso v. Watkins*, 367 U. S. 488 (1961).

Neither *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934) nor *In re Summers*, 325 U. S. 561 (1945) is contrary to this proposition. In the former case the Court held that a state could constitutionally condition attendance at its university upon the students' taking military training; and in the latter it held that a state could condition admission to the bar upon the applicant's willingness to bear arms. However, government may constitutionally compel citizens to bear arms in its defense (*Arver v. United States*, 245 U. S. 366 (1918)), and therefore may penalize refusal to do so by denial of a free higher education or admission to the bar. But government may not constitutionally compel any person to work on his Sabbath, and therefore may not penalize one who refuses to do so.

We submit, therefore, that the denial of unemployment benefits to one who will not violate his conscience by working on his Sabbath constitutes a restriction upon his religious freedom.

We recognize, of course, that a determination that the application of the South Carolina statute against the appellant restricts her religious freedom does not of itself determine the constitutional issue under the First Amendment. *Braunfeld v. Brown*, *supra*.

We recognize too that the religious freedom guaranteed by the First Amendment does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (1940). Concededly, the First Amendment does not preclude proscription of polygamy, breaching of the peace or child labor. *Reynolds v. United States*, 98 U. S. 145 (1878); *Davis v. Beason*, 133 U. S. 333 (1890); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942); *Prince v. Massachusetts*, 321 U. S. 158 (1944).

Nevertheless, when courts consider the validity of legislation regulating rights secured by the First Amendment, they do not apply the usual presumption of constitutionality. They recognize, rather, "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Marsh v. Alabama*, 326 U. S. 501, 509 (1946); *Prince v. Massachusetts*, *supra*, 321 U. S. at 164. Hence, "any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas v. Collins*, *supra*, 323 U. S. at 530. See also *West Virginia State Board of Education v. Barnette*, *supra*, 319 U. S. at 639.

Unless, therefore, the record establishes the existence of a clear and present danger that the Employment Security Law of South Carolina cannot be effectively administered if the appellant's view prevails, the statute as construed violates the religious guarantee of the Federal Constitution. Nothing in the record shows such a danger. Nothing establishes or even indicates that any substantial inconvenience to the administration of the law would result

from respecting the religious convictions of the appellant herein and others similarly situated. Indeed, there are several reasons to believe that no substantial prejudice would result to the administration of the Law by according benefits to a person whose convictions preclude him from accepting employment on Saturday.

1. The 5-day week has received almost uniform acceptance in American industry. It is clear from the statistics available on this subject that at present the 5-day, 40-hour week, has been established as a normal worktime schedule. Thus, the most recent figure available from the Bureau of Labor Statistics indicates that the average hours worked by all employed persons in January 1963 was 40.1. The average hours for production and manufacturing workers in 1952 was 40.7, in 1958, 39.9, in 1961, 39.8 and in 1962, 40.4. (Additional figures are available in *Employment and Earnings*, the monthly periodical of the Bureau of Labor Statistics. See, for example, the issue of January 1963.) While there are fluctuations in the average number of hours worked in the United States, on a yearly and monthly basis, it is apparent, first, that the average fluctuation is not very great, and, second, that the fluctuation tends to be tied to the business cycle. The long-range trend is toward a decrease in working hours. (The last time that there was a substantial deviation was during the war years when, with the need for increased production, many people worked overtime. During the war years, the average hours were between 45 and 46 hours a week.) There should therefore be no abnormal difficulty in obtaining employment on the basis of the 5-day week and consequently no abnormal strain on the administration of the unemployment law.

2. Appellant has not refused to work even six days weekly. She has simply refused to work on her Sabbath. She expressed her willingness "to work in another mill or in any other industry so long as she was not required to work on her Sabbath" (Statement as to Jurisdiction, pp. 6-7). South Carolina permits engaging in "works of necessity" on Sunday (S. C. Code, Sec. 64-2). Indeed, it even permits working on Sunday in textile plants, the very industry in which appellant has been engaged for 35 years, in order to "maintain a normal production schedule" (Sec. 64-4). Appellant therefore has not withdrawn herself from the available labor market, and her inability to find employment presents a situation not different from that which is the basis for all unemployment insurance laws.

3. Even if an abnormal difficulty existed in obtaining employment for persons whose religious convictions prohibited them from working on Saturday, no serious prejudice to the administration of the Unemployment Compensation Law would result. According to the *Census of Religious Bodies of the United States*, Department of Commerce, Bureau of Census, there were in 1936 only 429 Seventh Day Adventists and 605 Jews in South Carolina. Today, these figures may have increased at most by 100%, making at most a combined total of about 2,000. Of course, only a small proportion of these are workers who are covered by the Unemployment Compensation Law. The population of South Carolina according to the 1960 census, was 2,382,594. Hence, it is clear that only an insignificant number of seventh-day observers are involved. Even if all found abnormal difficulty in obtaining employment not re-



quiring work on Saturday, which is obviously highly improbable, no undue burden upon the unemployment compensation administration would result.

4. Of the 50 states in the Union, at least 35 do not impose forfeiture of benefits for refusal of a seventh-day observer to accept a position requiring Saturday work.\* The three reported decisions on the subject by highest state courts all uphold Sabbatarians' right to unemployment benefits. *In re Miller*, 243 N. C. 509 (1956); *Tary v. Board of Review*, 161 Ohio St. 251 (1945); *Swenson v. Unemployment Security Commission*, 340 Mich. 430 (1940). In addition numerous state administrative commissions have ruled the same way.\*\*

\* This statement is based upon a survey conducted by the American Jewish Congress in 1952. The question was put to the unemployment compensation administration of 48 states and the District of Columbia. Replies were received from all. These indicated that in five states (Georgia, Massachusetts, South Carolina, Utah and Wisconsin) the issue had not then arisen and no policy had been reached. In eight states (Kansas, Missouri, Montana, New Hampshire, Ohio, Oregon, Tennessee and West Virginia) the replies were that forfeiture would be imposed. In the other 35 states and the District of Columbia the replies were that forfeiture would not be imposed.

\*\* California, Case No. 7643, Cal. A., Unemp. Comp. Int. Serv., Ben. Serv., Vol. 5, No. 10; Connecticut, *Susman v. The Administrator of Unemp. Comp.*, No. 463-C-45 (1945); District of Columbia, Case No. 11372, D. C. A., Unemp. Comp. Int. Serv., Ben. Serv., Vol. 10, No. 4; Georgia, Case No. 11931, Ga. A., *id.* at Vol. 10, No. 11; Idaho, Case No. 12661, Ida. A., *id.* at Vol. 11, No. 8; Illinois, Case No. 8303, Ill. A., *id.* at Vol. 7, No. 1; Illinois, Case No. 10325, Ill. R., *id.* at Vol. 9, No. 3; Kansas, Case No. 10451, Kans. A., *id.* at Vol. 9, No. 4-5; Kentucky, Case No. 9596, Ky. A., *id.* at Vol. 8, No. 7; Louisiana Board of Review, Decision No. 114-BR-50, 1950; Maryland, Case No. 11705, Md. R., Unemp. Comp. Int. Serv., Ben. Serv., at Vol. 10, No. 8; Michigan, Case No. 8029, Mich. A., *id.* at Vol. 6, No. 6; New Jersey, Case No. 8767, N. J. R., *id.* at Vol. 7, No. 9; New York Case No. 10197, N. Y. A., *id.* at Vol. 9, No. 1; North Carolina, Case No. 9007, N. C. A., *id.* at Vol. 7, No. 12; Okla-



In many of these states there are far greater numbers of Orthodox Jews and Seventh-day Adventists than in South Carolina. Nevertheless, these states have not found that any undue burden on the unemployment compensation fund resulted from the granting of benefits to such Saturday observers. It may therefore be asserted with reasonable certainty that no undue burden on the unemployment compensation fund of South Carolina would result from the granting of benefits to the few Jewish and other seventh-day observers unable to find employment not repugnant to their morals and conscience.

5. The best evidence that the administration of the unemployment insurance system would not be unduly prejudiced in the present case if the appellant's religious convictions were respected is the fact that there are some 150 Seventh-day Adventists in the Spartanburg area and that, with the exception of the appellant and one other person, all are gainfully employed but not working on their Sabbath (Statement as to Jurisdiction, p. 27a).

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homa, Case No. 7600, Okla. A., *id.* at Vol. 5, No. 10; Oregon, Case No. 7512, Ore. A., *id.* at Vol. 5, No. 9; Tennessee, Case No. 10055, Tenn. R., *id.* at Vol. 8, No. 11; Tennessee, Case No. 12796, Tenn. R., *id.* at Vol. 11, No. 9; Virginia, Case No. 11273, Va. A., *id.* at Vol. 10, No. 2; Washington, Case No. 9107, Wash. R., *id.* at Vol. 8, No. 1; West Virginia, Case No. 7267, W. Va. A., *id.* at Vol. 5, No. 5; Wisconsin, Case No. 10154, Wisc. A., *id.* at Vol. 8, No. 12.

## POINT II

**The denial of unemployment insurance benefits to the appellant, although no such forfeiture is suffered by those who refuse for reasons of conscience to work on Sunday, violates the First Amendment's ban on laws respecting an establishment of religion and deprives the appellant of the equal protection of the laws.**

South Carolina does not forbid all labor on Sundays. Works of charity and necessity are allowed (South Carolina Code 64-2). Moreover, even work in textile plants of the kind engaged in by the appellant is legally permissible where necessary to "maintain a normal production schedule" (Sec. 64-4). However, the statute makes it quite clear that a worker who for religious reasons refuses to work on Sunday may not for that reason be denied unemployment insurance benefits. Sec. 64-5 of the statute expressly provides that " \* \* \* no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal or be discriminated against in any other manner." (Emphasis added.)

If there is anything certain in constitutional law it is that the First Amendment forbids government from preferring one religion over another. Four times within little more than a decade this Court has specifically stated (*Everson v. Board of Education*, 330 U. S. 1, 15 (1947); *McColum v. Board of Education*, 333 U. S. 203, 210 (1948); *Mc-*

*Gowan v. Maryland, supra*, 366 U. S. at 443; *Torcaso v. Watkins, supra*, 367 U. S. at 492-3):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another \* \* \*. (Emphasis added.)

Almost a century ago, and repeated often since then, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U. S. (13 Wall.) 679, 728 (1872). In *Fowler v. Rhode Island*, 345 U. S. 67 (1953), this Court held unequivocally that under our Constitution, government may not prefer large, conventional religions over small, unorthodox ones.

We submit that it is exactly this forbidden type of preference that is involved in the present case. By allowing a conscientious observer of Sunday to refrain from labor on that day without forfeiting his right to unemployment compensation while this sanction is imposed upon one who conscientiously observes Saturday, the state clearly prefers Sunday-observing over Saturday-observing faiths. This, we submit, the First Amendment forbids.

It should be noted that, in upholding the Sunday law statute in *McGowan v. Maryland, supra*, this Court carefully stated that the decision was based on the ground that the statute was secular in its purpose and operation, intended not to aid religion or prefer Sunday-observing Christianity over other faiths but to assure a common day of rest and relaxation for all. The Court made it clear that Sunday legislation would violate "the 'Establishment'

Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or its operative effect—is to use the State's coercive power to aid religion."

That is the situation in the present case. Here, the statute excuses refusal to work on Sunday for two reasons, one ("physical objections") obviously secular, but the other ("conscientious objections") expressly religious. Here, a Seventh-day Adventist or Jew is forced, under penalty of loss of financial benefits from the State at a time when they are most needed, to violate his conscience by working on his Sabbath, whereas Sunday-observing Christians suffer no such penalty.

For the same reason, the action of the South Carolina Employment Security Commission denies to the appellant the equal protection of the laws. (See concurring opinion of Mr. Justice Frankfurter in *Fowler v. Rhode Island*, *supra*, 345 U. S. at 70.) In effect, it imposes a religious test for the right to receive unemployment benefits. What this Court said in *Torcaso v. Watkins*, *supra*, 367 U. S. at 495-496, in respect to public employment is equally applicable to unemployment benefits:

The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U. S. 183. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "... that no federal employe shall attend Mass or take any active part in missionary work."

Applicable too is the statement of this Court in *Everson v. Board of Education, supra*, 330 U. S. at 16, that a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (Emphasis in original.)

This, we submit, is exactly what is happening in the present case. Under the decision below, a Seventh-day Adventist or a Jew is excluded from receiving the benefits of public welfare legislation exclusively because of adherence to his faith, for if he were of a Sunday-observing faith he would not be excluded because of his membership in that faith and his adherence to its doctrines and principles.

### Conclusion

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

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February, 1963

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# Supreme Court of the United States

OCTOBER TERM, 1962

No. 526.

ADELL H. SHERBERT, Appellant,

*versus*

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S.  
GALLOWAY, SR., AS MEMBERS OF SOUTH CAROLINA  
EMPLOYMENT SECURITY COMMISSION, AND SPARTAN  
MILLS, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

## BRIEF FOR THE RESPONDENTS

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# Supreme Court of the United States

OCTOBER TERM, 1962

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No. 526

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ADELL H. SHERBERT, Appellant,

*versus*

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S.  
GALLOWAY, SR., AS MEMBERS OF SOUTH CAROLINA  
EMPLOYMENT SECURITY COMMISSION, AND SPARTAN  
MILLS, Respondents.

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ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

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## BRIEF FOR THE RESPONDENTS

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### OPINIONS BELOW

The "decree" (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina, (R. 26-31) is not officially reported. The opinion of the Supreme Court of South Carolina (R. 34-49) and the dissenting opinion (R. 50-62) are reported in 240 S. C. 286, 125 S. E. (2d) 737.

## JURISDICTION

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960. The opinion of the Supreme Court of South Carolina was filed and entered May 17, 1962. No applications for rehearing were filed. Appellant filed notice of appeal August 15, 1960 (R. 62). This Court noted probable jurisdiction December 17, 1962 (R. 64). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2) (1958).

## QUESTIONS PRESENTED

Whether, where a state unemployment compensation law requires, as a condition to eligibility for unemployment compensation benefits, that a claimant be "available for work" and further provides for some disqualification for benefits if the claimant fails, without good cause, to "accept available suitable work," and such statute is construed and applied so as to make ineligible and to disqualify for five weeks compensation benefits a woman who, as a *bona fide* member of the Seventh-Day Adventist Church, is unwilling and refuses to work on her Sabbath, from sundown on Friday to sundown on Saturday,—either for her employer, when he, 22 months after she became an Adventist, joined other textile plants in requiring a six-day work week, or for anyone else,—but who is willing to accept any suitable work not conflicting with the period of her Sabbath, whether the state statute, as so construed and applied,

(1) Violates the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment.

(2) Is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment including the inhibitions of the First Amendment against abridgment of the free exercise of religion.



**STATUTES INVOLVED**

The South Carolina Unemployment Compensation Law (S. C. Code (1952), now supplanted by S. C. Code (1962) ) provides:

**"SEC. 68-113. BENEFITS ELIGIBILITY CONDITIONS.**

An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:

- • •
- (3) He is able to work and is available for work.

**SEC. 68-114. DISQUALIFICATION FOR BENEFITS.**

Any insured worker shall be ineligible for benefits:

- • •
- (2) "Discharge for misconduct." If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period).

- • •
- (3) "Failure to accept work." If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer. • • • such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period).

• • •

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals. • • • 1"

The declaration of State public policy for the unemployment compensation laws is contained in Code Section 68-36, which provides:

"Without intending that this section shall supersede, alter or modify the specific provisions contained in this Title but as a guide to the interpretation and application of this Title, the public policy of this State is declared to be as follows: economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The General Assembly therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

<sup>1</sup> This subsection (a) was added to Section 68-114 by amendment in 1955, S. C. Acts 1955, No. 254, Secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it was not carried into the Code until the adoption of the new S. C. Code (1962), on January 9, 1962.

**STATEMENT**

Judicial action was initiated when appellant filed a petition in the Court of Common Pleas for Spartanburg County, South Carolina (R. 18-20) under Section 68-165, S.C. Code (1952) to review and reverse the decision of the State Employment Security Commission (R. 16-17) that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturday (because of her religious belief as a Seventh Day Adventist) and hence was not "available for work" as required by Sec. 68-113(3), S. C. Code (1952);

(2) disqualified for five weeks' benefits because she had been "discharged for misconduct"—unexcused absences on Saturday, rendering her ineligible for benefits under Section 68-114(2), S. C. Code (1952).

The Court of Common Pleas affirmed the decision of the Commission (R. 26-31). The Supreme Court of South Carolina affirmed (R. 34-49) Bussey, J., filed a dissenting opinion (R. 50-62). No applications for rehearing were filed.

There is no conflict in the facts of record—Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina, as a spool tender for thirty-five years (R. 4-8) and had been so employed without interruption since August 8, 1938 (R. 6). From the end of World War II and until June 6, 1959, Saturday work in this plant was on a voluntary basis (R. 5), and appellant worked only five days a week, Monday through Friday, on the first shift—7 a. m. to 3 p. m. (R. 8).

On or about August 6, 1957, appellant became a member of the Seventh Day Adventist church (R. 11). The religious teaching of that church is that the Sabbath commanded by God commences at sundown Friday evening and ends at sundown on Saturday evening (R. 10) and labor or common work during that period is forbidden (R. 10, 13). Appellant,

as a member of the denomination, shares that belief and in the practice thereof did not work at Spartan Mills on her Sabbath after she joined the church August 6, 1957 (R. 11-12).

On June 5, 1959 (R. 5), Spartan Mills changed to a six-day week, posting a notice that all employees would be required to work on Saturdays thereafter (R. 5, 8). Appellant explained to her employer that she could not and would not work on Saturday because it was her Sabbath, (R. 11), and thereafter she missed work on six successive Saturdays (R. 5, 9). She was discharged on July 27, 1959 (R. 9) because of her refusal to work on Saturday (R. 9-11). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were other textile mills in the area (R. 9-10) and she remained unwilling to take any work that would require her to work on her Sabbath. (R. 11). Appellant expressed willingness to work in another mill or in any other industry so long as she was not required to work on her Sabbath (R. 12).

The evidence showed that, other than appellant and one other,<sup>2</sup> all of approximately one hundred and fifty members of the Seventh Day Adventist Church in Spartanburg were gainfully employed in that area and experienced no particular difficulty in obtaining jobs although none worked on the Saturday Sabbath (R. 12).

**Administrative Determinations**—Appellant on July 29, 1959, filed her claim (R. 3-4) with the South Carolina Employment Security Commission for unemployment compensation benefits, Title 68, S. C. Code (1952). Claimant set forth in the claim that she would accept only any suitable work offered on the first shift (R. 4). The claims examiner found the appellant ineligible under Sec. 68-113(3) because

<sup>2</sup> In *Sally W. Lloyd v. Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case.

not "available for work" in that her refusal to work on Saturday made her not "available for work during the regular work week observed in the industry and area" in which she had worked (R. 4-5). He also held her partially "disqualified" for benefits under Sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused absences for six successive Saturdays (R. 4-7).

The affirming decision of the Referee or Appeal Tribunal (R. 14-15) was affirmed by the state Commission (R. 16-17).

Judicial Review—On the petition of the appellant (R. 18-20) the answers of the state commission (R. 20-22) and of the employer, Spartan Mills (R. 23-25), both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed (R. 26-31).

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, violated the free exercise of religion clause of the First Amendment as absorbed into the Fourteenth Amendment, and as well violated the same amendment by denying appellant the "protection and the benefits accorded by the Laws of South Carolina to those who observe Sunday as their Sabbath" (R. 33).

The Supreme Court of South Carolina, in its opinion and judgment here under review, concluded:

(1) Appellant was ineligible initially for unemployment benefits because she was not "available for work" within the meaning of Sec. 68-113(3), S. C. Code (1952), since she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works," (R. 44, 48).

(2) Appellant was properly disqualified for five weeks' benefits, not on the ground assigned by the court below—misconduct under Sec. 68-114(2)—but because under Sec. 68-114(3) she had "failed, without good cause . . . to accept available work when offered . . . by the employer" (R. 48-49).

As to the constitutional issues raised under appellant's assignments of error to the South Carolina Supreme Court, the State's highest court concluded:

"However, our Unemployment Compensation Act, as (it) is hereinbefore construed, places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

## ARGUMENT

### I

**APPELLANT HAS BEEN UNABLE TO SHOW THAT THE CONSTRUCTION AND APPLICATION OF THE "AVAILABLE FOR WORK" ELIGIBILITY STANDARD FOR UNEMPLOYMENT COMPENSATION BENEFITS UNCONSTITUTIONALLY PROHIBITS OR INTERFERES WITH THE FREE EXERCISE OF APPELLANT'S RELIGION.**

The law challenged here does not violate the First Amendment of the Federal Constitution, which as applied to the states under the Fourteenth Amendment, prohibits laws respecting an establishment of religion or prohibiting the free exercise of religion.

#### (a) Preliminary considerations.

The portion of the First Amendment here involved provides:



"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. \* \* \*

Appellant relies solely on the "free exercise" clause (Appellant's Br., p. 13) and contends that the state law, by the alleged coercion of withheld employment compensation benefits, invades the realm of her religious belief and requires her, in derogation of that belief and contrary to the tenets of her church, to profess a willingness to work on her Saturday Sabbath, and to accept a job involving work on Saturday. The standing of the appellant to invoke the Constitution can only be predicated on a showing by appellant that the enforcement of the Act deprives her of liberty without due process of law under the Fourteenth Amendment. Deprivation of life is obviously not involved, and appellant can show no accrued property interest or right to unemployment compensation benefits. Cf. *Fleming v. Nestor*, 363 U. S. 603, 608-611 (social security benefits are not accrued property rights within contemplation of due process clause of Fifth Amendment).

The constitutional right of an individual to worship God in such manner and form as he may desire, with or without affiliation of any particular denomination or creed, has long been recognized. The First Amendment safeguards free exercise of the chosen form of religion, but it embraces two concepts, freedom to believe, and freedom to act. *Cantwell v. Connecticut*, 310 U. S. 296, 303. The appellant relies on the concept that freedom of religious belief is absolute (in contrast with the conditioned nature of the freedom to act), and she contends that the unemployment compensation laws, as constructed to render her ineligible for benefits, coerces the absolute right of free religious belief.

Concededly, certain aspects of religious exercises cannot be restricted or burdened by either Federal or State legislation; compulsion by law of the acceptance of any

creed or the practice of any form of worship is forbidden. *Cantirell v. Connecticut*, 310 U. S. 296, 303; and, *cf. Reganols v. United States*, 98 U. S. 145.

**(b) Ineligibility for benefits is not coercion to work on Sabbath in violation of freedom to believe.**

The court below concluded that the appellant was unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry worked, and by restricting her willingness to work to periods or conditions to satisfy her own personal circumstances, she was not "available for work" within the benefits eligibility standards contemplated by the state unemployment compensation law. The court likewise concluded that the appellant had failed to accept, without good cause, available suitable work offered her by her employer, thereby supporting a disqualification for benefits of five weeks.

The appellant characterizes this construction and application of the state unemployment compensation laws as a substantial penalty on the exercise by her of her religious freedom, and in effect characterizes the denial of unemployment compensation benefits as the imposition of a "penalty" equally as obnoxious as the exaction of a tax or fine as a condition to the exercise of a First Amendment liberty.

In the case of *Braunfeld v. Brown*, 366 U. S. 599, the emphasis was on the question whether a Sunday closing law was invalid as applied to Orthodox Jewish storekeepers who were compelled by their religion to remain closed on Sundays. In sustaining the validity of the legislation, the Court began by asserting the proposition that the state has no power to coerce belief, as opposed to the control of actions. The Court then held that the Pennsylvania statute did not directly impinge on any religious practice: "The Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their re-

ligious beliefs more expensive." (366 U. S. at 604.) Indirect burdens on religion do not violate the freedom of religion provision; the opinion of the Chief Justice in *Branzburg* states (366 U. S. at 606-607):

"To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i. e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

"Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257. *U. S. G.* Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

"Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross

oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate individually between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

The South Carolina unemployment compensation law does not make criminal the holding of any religious belief or opinion, nor does it force or coerce any person to embrace a particular religious belief or to state or believe anything in conflict with their religious tenets. The laws were enacted under the general police power of the state, are primarily secular in purpose, and operate within a legitimate and important sphere (unemployment conditions and effects) of predominantly local interest. As applied to the appellant, the laws may operate incidentally to make the practice of her religious beliefs more expensive under the five weeks disqualification for unemployment compensation benefits. But no person has an absolute right to unemployment compensation benefits. The indirect financial burden on appellant is not aimed at nor does it impede freedom of religion, and it does not discriminate invidiously against any personal rights of appellant guaranteed under the First Amendment. *Braunfeld v. Brown*, 366 U. S. 599; *Gallagher v. Crown Koshier Super Market*, 366 U. S. 617; *McGowan v. Maryland*, 366 U. S. 420; *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 366 U. S. 582.

Appellant cites *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, as holding that the absolute freedom to believe necessarily means, as a corollary, that

no one can be compelled by word or act to do an act in conflict with his religious belief (Appellant's Br., p. 15). In *Brannan v. Brown*, 356 U. S. 599, 603, the opinion reflects:

"Thus, in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, \* \* \* this court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag."

"But this is not the case at bar: the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to state or believe anything in conflict with his religious tenets."

"However, the freedom to act, whenever the action is in accord with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut*, *supra*, (310 U. S. pp. 303, 304, 305). As pointed out in *Reynolds v. United States*, *supra*, (98 U. S. to p. 164), legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion \* \* \*."

And, unlike the program of religious education struck down in *McCullum v. Board of Education*, 333 U. S. 203 (1948), the South Carolina unemployment compensation law, as here construed and applied, does not involve proselytizing, persuasion, or religious indoctrination. It involves no state compelled avowal or disavowal of faith, acceptance of doctrine, or statement of belief. The "available for work" standard as a criterion for measuring eligibility for unemployment compensation benefits or privileges (the employee contributes nothing to the fund from which benefits are paid), unlike the religious oath of office in *Torcaso v. Watkins*, 367 U. S. 488 (1961), or the solemn avowal of prayer

in *Engel v. Vitale*, 370 U. S. 421 (1962), has no religious connotations; and appellant cannot reasonably say that its application prohibited her freedom of religious belief in violation of First Amendment.

The freedom of religion guaranteed by the First Amendment does not include freedom from all legislation with respect to acts and conduct, and the state, to provide stable employment conditions, must be left free to administer the standards under which its act conditions unemployment compensation benefits, even though the application of the standard in some instances may be contrary to the religious scruples of some. The legislature is the proper branch of government to ameliorate any harsh administrative and judicial application of the primary eligibility standards of this public welfare legislation. Cf. *Finkelstein, Judicial Self-Limitation*, 37 Harv. L. Rev. 338, 345 (1924).

## II

**THE "AVAILABLE FOR WORK" ELIGIBILITY STANDARD FOR UNEMPLOYMENT BENEFITS WAS REASONABLY CONSTRUED AND APPLIED, AND ANY BURDEN ON APPELLANT IS ECONOMIC IN CHARACTER AND VALID AND NECESSARY REGULATION WITHIN THE PURPOSE AND EFFECT OF ADVANCING THE STATE'S SECULAR GOALS OF OBTAINING STABLE EMPLOYMENT.**

Appellant contends that the construction below of the available for work standard for unemployment compensation benefits prohibits appellant's free exercise of religion without any compelling reason.

Subjection of appellant to the general requirement of unrestricted availability for work, as a measure conducive to the basic purposes of the South Carolina unemployment compensation act, is far from being the first instance of



exacting obedience to general laws that offend religious scruples. See *Jacobson v. Massachusetts*, 197 U. S. 11 (compulsory vaccination); *Hamilton v. University of California*, 293 U. S. 245, 267 (obligation to bear arms); *Stansbury v. Marks*, 2 Dall (PA) 213, 1 L. Ed. 353 (testimonial duties)—these are illustrations of conduct that has been compelled in the enforcement of legislation of general applicability even though the religious conscience of the individual rebelled at the exaction.

In *Hamilton v. University of California*, *supra*, this Court held that one attending a state-maintained university cannot refuse attendance of courses that offend his religious scruples. Attendance at the institution for higher learning was voluntary, and therefore the Court reasoned that a student could not refuse compliance with its conditions and yet take advantage of its opportunities.

(a) **"Available for work" standard was reasonably applied and did not circumvent religious freedoms.**

It is necessary to inquire what construction has been placed on the pertinent statutes by the highest court of the state, for "that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution." *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73. Appellant has the burden of proving the unreasonableness of a classification, and a statute will not be held unconstitutional on that ground unless there is no reasonable basis for the classification. *Moran v. Doud*, 354 U. S. 457, 463.

The unemployment compensation law of South Carolina was enacted under the general police power for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault

of their own. Its fundamental purpose was to protect against economic insecurity due to involuntary unemployment because of the inability of industry to provide stable employment. See Section 68-36, Code of Laws of South Carolina, 1952; *Mills v. S. C. Unemployment Compensation Commission, et al.*, 204 S. C. 37, 28 S. E. (2d) 536.

In order to qualify for unemployment benefits, a claimant must be "available for work," and this phrase includes availability on days required in the claimant's trade or occupation. The appellant, like everyone else, is free to choose and engage in a religion, and in a trade or occupation. These are voluntary choices. The court below concluded that there was "nothing in the Act itself or in circumstances surrounding its passage to indicate an intention on the part of the legislature to provide benefits for the worker compelled to give up his job solely because of a change in his personal circumstances." (R. 42, 43.)

**(b) Any deterrent effect of benefits ineligibility minimized and outweighed by dominant public interest.**

It is submitted that, on the record, any possible deterrent effect of this legislation on the appellant is economic in nature and is outweighed by the dominant public interest in conditioning unemployment compensation benefits to periods of involuntary unemployment, which can only be achieved by systematic and consistent application of benefits eligibility standards by the individual states. Cf. *Braunfeld v. Brown*, 366 U. S. 599, at 462 ("balancing of interests," concurring opinion, Mr. Justice Frankfurter). In the domain of the indispensable liberties guaranteed under the Bill of Rights, this Court has frequently upheld the constitutionality of legislation notwithstanding the possible deterrent effect of the legislation in question upon the freedoms involved. See *American Communications Assn. v. Douds*, 339 U. S. 382, 398-399, and cases cited therein.

The phrase "available for work" has also been construed to require "the claimant to actively and unrestrictedly endeavor to locate suitable employment in the market where he resides." *Virginia Employment Commission v. Coleman*, 111 Va. ...., 129 S. E. (2d) 6, 9 (1963). In her claim for benefits appellant conceded that she would only accept suitable work offered on the first shift (R. 10). Although the other adherents of the Seventh Day Adventist sect were gainfully employed in "suitable" employment, there is nothing in the record reflecting an active and unrestricted endeavor by appellant to locate suitable employment in the Spartanburg area. Appellant, moreover, knew or should have known, that any upswing in the textile business cycle would result in mandatory Saturday employment. Yet she remained at Spartan Mills after joining the Seventh Day Adventist Church, and she even elected to remain there approximately six weeks after notice of mandatory Saturday work.

The policy and underlying purposes of the unemployment compensation law are easily frustrated by an interpretation that one who will work Monday to sundown on Friday has not restricted her utility and desirability in the labor market (where all textile plants operate on a six-day basis). Whether a claimant is "available for work" during a specific period is a question of fact, to be determined in the first instance by the Commission. See *In Re Dunn's claims*, 1 A. D. (2d) 722, 146 N. Y. S. (2d) 872. The burden is upon the claimant to show that she has met the benefit eligibility conditions, and she cannot show unrestricted availability for work in this case. The achievement of a five-day work week should not result from judicial mandate, but be left to the Legislatures of the individual states.

The adherence by claimant to the religious tenets of the Seventh Day Adventist Church is certainly not censur-

able but, to the contrary, is laudable. Cf. *Zorach v. Clauson*, 343 U. S. 306. But claimant's election to join the Seventh Day Adventist Church was a matter personal to her and arose in no respect out of her employment. The unemployment compensation law was designed to mitigate the effects of involuntary unemployment caused by the failure of the economy to provide stable employment. It was not intended to insure compensation benefits to persons who for personal reasons (religious or otherwise) limit their employability, since there can obviously be no absolute right or privilege to these benefits.

There is at most only a tenuous showing by appellant of coercion or infringement on her religious observance by invoking the "available for work" criterion to deny unemployment compensation benefits in this case. Cf. *Braunfeld v. Brown*, 66 U. S. 599, 602-610. The statute does not deny its monetary benefits to Seventh Day Adventists any more, for example, than it does to mothers of young children who, for personal reasons unrelated to employment, choose to restrict their utility and availability in the labor market for which they are fitted. Cf. *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S. C. 37, 28 S. E. (2d) 535; *Hartsville Cotton Mills v. South Carolina Employment Security Commission*, 224 S. C. 407, 79 S. E. (2d) 381. The premise that one may refuse employment because of some personal belief or because of membership in a certain organization, and at the same time enjoy unemployment compensation at the indirect but real expense of another who must accept the same character of employment or suffer a loss of compensation, is untenable. Cf. *Reynolds v. United States*, 98 U. S. 145, 166.

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in

the excesses of unrestrained abuses." *Carter v. New Hampshire*, 312 U. S. 569, 574. The regulation of local unemployment conditions and effects is certainly public welfare legislation enacted under the police power of the state in recognition of social need, and the application of the "available for work" standard in this case only operates so as to avoid a state subsidy to Saturday observers who are unwilling to work the usual hours required by their industry.

*People v. Friedman*, 302 N. Y. 75, 46 N. E. (2d) 184, 186, appeal dismissed, 341 U. S. 907, upheld against constitutional attack a penal statute which forbade the sale of uncooked meat on Sunday. The court, although considering a Sunday law, used reasoning which is apposite here:

"Nor may we say that Section 21-47 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a law respecting an establishment of religion, or prohibiting the free exercise thereof, U. S. Constitution, 1st Amendment. It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. \* \* \*"

The appellant relies on several cases as supporting her contention that the statute unnecessarily infringes upon her religious freedom under the First Amendment (Appellant's Br., p. 22). The decisions upon which appellants rely are not applicable. In *Cantwell v. Connecticut*, 310 U. S. 296, the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a solicitation permit if he determined it was not, thus establishing a censorship of religion. In *Lovell v. Griffin*, 303 U. S. 444, the ordinance prohibited the distribution of literature of

any kind at any time, at any place, and in any manner, without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Schneider v. State*, 308 U. S. 147 (p. 163), the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it.

Appellant also claims that "unrestricted availability," on this record, fails to further or aid the accomplishment of the purpose of the statute. (It fails because it would exclude from eligibility as persons attached to the labor market at least 150 individuals who admittedly are presently performing services in the Spartanburg market although not available for work on Saturday." [Appellant's Br., p. 27].) But there is nothing in this record to indicate the nature or period of work for these 150 other employees, and appellant is hardly justified in observing that if they became claimants they would automatically fail to satisfy the availability for work standard for unemployment benefits.

It is obvious that the intentment of the statute is not to provide unemployment compensation where work is available, employment provided and employment terminated for personal reasons of the employee. The case at Bar presents a situation where stable employment was available, but the employee, of her own personal choice, was unavailable for work for reasons of her own.

(c) **"Risks to Morals" and disqualification for benefits for refusal to accept available suitable work.**

Appellant also suggests that she should not be disqualified because of the provision of subdivision (3) (a) of Section 68-114 of the South Carolina Code, 1952, because to



require her to work, the work must be "suitable" and the Commission must take into account "risks involving her morals." There is certainly no element of unsuitability of work in Spartan Mills which was available to appellant; for she had been engaged in textile work for thirty-five years. There is obviously no risk to her morals involved in that type of work, for she had been engaged in that work for many years, and she does not point to anything involving "moral risks" in the character of the work. When the legislature made the provision about "risks to morals," it had in mind work, the character of which would be morally objectionable to any employee, whether a Seventh Day Adventist, a Protestant, a Catholic, a Jew or unbeliever in any religion. The type of work that would involve "risks to morals" would be employment, the nature of which creates moral risks, as working in a place of business of dubious character and frequented by persons of questionable character. There is no such element involved in this case and the fact that claimant had worked in this textile employment for thirty-five years refutes conclusively any contention that the work was not "suitable" or that it involved "risk" to her morals. The "morals" argument is obviously based upon the Appellant's contention that to work at all, regardless of the character of the work, conflicted with her personal religious views—a choice made by her for personal reasons:

While no one questions the sincerity of the appellant, her reasons for refusing to work are purely personal. Elements of "morality" are also involved in the responsibility of caring for an employee's children, and of the moral responsibility of an employee going and living with her husband. Many other "moral" objections might be equally valid and sincere, but there is a distinction between a laudable

motive for leaving employment and a good cause within the meaning of the Act.

An Unemployment Compensation Act should receive a "sensible construction". While no one questions appellant's sincerity of religious belief, yet not to disqualify her for refusal to work under the circumstances, admits of opening the door to so much fraud on employers that one may doubt that such a construction of the unemployment compensation act conforms to the canon that all laws should receive a sensible construction.

The argument advanced in the present case would admit of employees, acting insincerely, to claim the right not to work on Saturday, because of asserted religious beliefs, and if discharged for refusal to work on Saturday, then to claim the right, as appellant does here, to collection of unemployment compensation. The disruptive effect upon an employer's operation and business would be untold. If substantial numbers should assert religious beliefs in this respect as a valid ground for not working on Saturday, it is plain what the effect would be on the continuity of the employer's operations, and the stability of the unemployment compensation fund.

It is submitted that the construction and application of the benefits eligibility standards here were consistent with the constitutional guarantee of religious freedom, and that there is reasonable justification for the state's action in this factual situation and as required by the secular goals of the state in obtaining stable employment conditions.

## III

**THE STATUTE, AS CONSTRUED, DOES NOT DEPRIVE APPELLANT OF THE DUE PROCESS AND EQUAL PROTECTION OF LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.**

**(a) Due process tenuously raised below.**

The challenge under the due process clause of the Fourteenth Amendment was at most tenuously raised by appellant in the state administrative and judicial proceedings leading to this appeal (see R. 33). The South Carolina Supreme Court did not pass specifically on the due process issue, probably because that issue was not properly raised under the rules of procedure governing appeals to that Court. Rules of the Supreme Court of South Carolina, Rule 4, §6, contained in Vol. 7, p. 429, S. C. Code (1952).<sup>3</sup> It is not within the province of appeal courts to search through the record for constitutional contentions which should have been appropriately listed within the assignments of error. *Beck v. Washington*, .... U. S. .... S. L. Ed. (2d) 98, 111; *State v. Alexander*, 230 S. C. 195, 94 S. E. (2d) 160; *Brady v. Brady*, 222 S. C. 242, 72 S. E. (2d) 193, 194. It is significant that the appellant filed no application for rehearing with the state supreme court, calling attention to any points with respect to due process supposed to have been overlooked or misapprehended by the Supreme Court. (Petitions for rehearing are authorized by the Rules of the South Carolina Supreme Court, Rule 17, §2).<sup>4</sup>

<sup>3</sup> "§6. Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review; and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exception should not be long or argumentative in form."

<sup>4</sup> "§2. Petitions for rehearing must be filed before the judgment of this Court has been remitted to the Court below. The petition for that

(b) Fourteenth Amendment permits states a wide scope of discretion.

It is nonetheless submitted that appellant's disagreement as to the construction and application of the "available for work" standard cannot rise to the level of a constitutional argument by couching that disagreement in the language of due process. Cf. *Psychological Association for Psychoanalysis, Inc., v. University of State of New York*, 8 N. Y. (2d) 197, 168 N. E. (2d) 649, Appeal dismissed, 365 U. S. 28. The history, social needs, purposes and scope of the unemployment compensation law, as construed and applied in this case and in other cases cited herein and in the majority opinion, indicate no punitive design against the appellant or her religious sect. No affirmative disability or restraint was imposed on the appellant's exercise of religion by determining that she was not "available for work" and, hence, ineligible for benefits for five weeks.

In the case of *Fleming v. Nestor*, 363 U. S. 603, this Court construed a section of the Social Security Act which disqualified certain alien deportees from the receipt of Social Security benefits while they were lawfully in this country. The Court, in considering the application of the Due Process Clause of the Fifth Amendment, recognized that the disqualification was not so lacking in rational justification as to offend due process, and concluded that "a person covered by the (Social Security) Act has not such

purpose, together with five copies thereof, must be filed with the Clerk, stating particularly the points supposed to have been overlooked or misapprehended by the Court, without argument, with a certificate from some counsel not concerned in the case that there is merit in such grounds, accompanied with a consent in writing signed by the parties and not by counsel, that the stay of remittitur shall be granted upon condition that the status of the property involved in the case, where specific property is involved, shall not be disturbed until after the final determination of the case. Upon the filing of the required petition and copies, the Clerk will stay the remittitur, forward the original petition to the Justice who rendered the opinion, and a copy to each of the other Justices and file a copy with the record. The Justice to whom the original is forwarded will take the necessary steps in having the petition passed upon."

a right in benefit payments (as) would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment." (366 U. S. at 611.) In this case, unemployment compensation benefits do not constitute property interests, and their denial is only an indirect financial burden on appellant's religious observance which the state can impose consistent with the social welfare nature of unemployment legislation. Cf. *McGowan v. Maryland*, 366 U. S. 420, 429.

The "available for work" criterion, as applied here, was neither irrational nor arbitrary when considered in light of the declared public policy to combat the effects of periodic unemployment. *McGowan v. Maryland*, 366 U. S. 429, 436, 437. And this Court has repeatedly recognized that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long-standing. *McGowan v. Maryland*, 366 U. S. 420, 534, 535 (concurring opinion of Mr. Justice Frankfurter, citing *United States v. Natural Carbonic Gas, Co.*, 220 U. S. 61, 78, 79). At 366 U. S. 420, 535, Mr. Justice Frankfurter states:

"The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality."

These standards for evaluating appellant's claims under the Due Process and Equal Protection clauses are set

forth elsewhere in the majority opinion in *McGowan v. Maryland*, 366 U. S. 420, 425, 426, as follows:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Citing cases.)

The traditional test under the Equal Protection clause has been whether a state has made "an invidious discrimination," as it does when it selects a "particular race or nationality for oppressive treatment." *Baker v. Carr*, . . . U. S. . . ., 7 L. Ed. (2d) 663, 701-702, concurring opinion Mr. Justice Douglas; *Skinner v. Oklahoma*, 316 U. S. 533, 541. Universal equality is not the test; there is room for weighting. Cf. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489. The prohibition of the equal protection clause goes no further than "invidious discrimination." *Ibid.* That the statute in its application may result in "incidental individual inequality" does not make it offensive to the Fourteenth Amendment. See *Phelps v. Board of Education*, 300 U. S. 319, 324 (equal protection not denied where administrative resolution grouping salary reductions by classes resulted in some instances of inequality in application); see, also, *Martin v. Walton*, . . . U. S. . . ., 1 L. Ed. (2d) 5, 6.

Thus, the Legislature may make reasonable classifications for the purpose of legislation. *Gallagher v. Crown Kasher Super Market*, 366 U. S. 617, 624; *Lindsley v. Nat-*



*ural Carbonic Gas Co.*, 220 U. S. 61, 78. With regard to equal protection, the Court said in *Lindsley*:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercises of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

**(c) There is no invidious discrimination under present construction of statutory unemployment compensation standards.**

The appellant contends that the unemployment compensation law, as construed, discriminates between believers of different religious faiths and deprives her of unemployment benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law. Appellant predicates the equal protection argument on an *ex parte* contention that the South Carolina Sunday laws permit of discrimination in favor of Sunday observers if unemployment compensation benefits are denied appellant because she refuses Saturday labor.

There is presented in the record not a trace of evidence that suggests that the "available for work" standard of the

unemployment compensation laws, as devised by the legislature and construed by the court below, discriminates invidiously against appellant and other Saturday observers. Any coincidental interplay of the Sunday laws with unemployment compensation is not automatically arbitrary or invidiously discriminatory. A statute is not to be struck down on supposition. That the uniform day of rest selected by the legislature does not coincide with the Sabbath of the appellant is no reason to invalidate this application of the state unemployment compensation laws under the Due Process or Equal Protection clauses of the Fourteenth Amendment.

The record does not warrant any inference that the construction and application of the "available for work" standard resulted in invidious discrimination among religions, or that local unemployment conditions and effects do not rationally justify the construction adopted by the court below. Cf. *Salsburg v. Maryland*, 46 U. S. 545, 552, 553. It may be conceded that religion cannot supply a basis for classification of governmental action. But the classification here relates only to the underlying causes and effects of unemployment by requiring claimants for unemployment compensation to comply with certain reasonable eligibility standards.

This is not classification in terms of religion. To permit individuals to be excused from compliance with unemployment compensation laws solely on the basis of religious preferences is to subject others (employees and employer) to penalties for failure to subscribe to those same beliefs. Cf. *Reynolds v. United States*, 98 U. S. 145, 166.

There is no merit in the contention that appellant has been denied equal protection on the ground that the statute, as construed, results in discrimination between believers of different religious faiths. In *Beck v. Washington*,

U. S. . . . . S. L. Ed. (2d) 98, 111, the Court recognized:

"\* \* \* The petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not assure uniformity of judicial decisions \* \* \* (or) immunity from judicial error \* \* \* *Milwaukee Electric R. & Light Co. v. Wisconsin*, 252 U. S. 100, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 A. L. R. 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

What appellant really seeks is a five day week. Members of the Seventh Day Adventist Church cannot, because of their religious beliefs, work on Saturday, and they can't work under the law on Sunday. Other employees can work on Saturday, but are legally proscribed from working on Sunday. All of the employees are essential to the continued operation of a mill, so if some of them can't work on Saturday, and all are prohibited from working on Sunday, the necessary normal operation of the mill cannot proceed.

Laws relating to the observance of Sunday have no relation to or predication upon religion or the enforcement of religious beliefs. It was within the Legislature's discretion to fix the day when all labor, within the limits of the state, works of necessity and charity accepted, should cease. That the uniform day of rest selected by the legislative bodies coincides with the Christian Sabbath is no reason to invalidate the construction here placed on the unemployment compensation laws.

The Legislature of South Carolina has designated Sunday, not because it is the religious day according to opinion of the majority, but because it is the day when the Legislature has provided that secular work and activities shall cease. It has no relation to religion or the free exercise of religion. There are many, no doubt, who have no

religious objections to working, playing or engaging in any other activity on Sunday, but they are prohibited by these statutes; and others who recognize another Sabbath because of their religious beliefs are nonetheless bound by the legislative determination that Sunday is the day of rest. The Legislature has fixed Sunday as the day when all activities shall cease. That, therefore, is the legal day when secular activities must cease. The appellant in this case seeks legal rights under the Unemployment Act and thereby she asserts the right to have Saturday held to be a legal day of rest. Neither she nor any one else, according to their religious beliefs can bring about rights because of those beliefs. Religious beliefs have no relation to Sunday as the day of rest and any other day selected by any particular faith can have no legal effect based on religious grounds.

Not only does the fixing of Sunday by the legislature have no religious connotation, and not only does the fixing of that day, majority view though it may be, not amount to any discrimination or denial of equal protection of the laws, but, on the contrary, what appellant asks is discrimination in her favor, and that of other members of her church, against all others not subscribing to that tenet of faith. She asks that she be allowed a "day of rest" to which others are not entitled, and that she have two days of rest, while others have only one. Cf. *McGowan v. Maryland*, 366 U. S. 420; *Braunfeld v. Brown*, 366 U. S. 599; *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582; *Gallagher v. Crown Kasher Super Market*, 366 U. S. 617.

We, therefore, submit that the administrative and judicial tribunals below were entirely correct in disqualifying appellant for unemployment compensation benefits for her unavailability for work, and that her asserted religious beliefs are not of such a character as come within the moral risks to which the unemployment statute refers.

The statute, as construed and applied to the facts and circumstances of this case, does not deprive the appellant of due process or of equal protection of laws in violation of the Fourteenth Amendment.

### CONCLUSION

It is respectfully submitted that:

1. The South Carolina Unemployment Compensation Law as here construed and applied does not prohibit or interfere with appellant's free exercise of religion.

2. Although appellant relies solely on the free exercise clause, we submit that since the unemployment compensation laws do not involve religious instruction or proselytizing nor require or suggest the performance of a religious act, they do not constitute an establishment of religion within the contemplation of the First Amendment to the Constitution.

3. There is no basis on the record to warrant finding that the South Carolina Supreme Court misconstrued or misapplied the unemployment compensation eligibility standards; the standards, as construed and applied, did not deprive appellant of due process or equal protection in violation of the Fourteenth Amendment.

The respondents therefore respectfully submit that the judgment of the court below should be affirmed.

Dated: April 2, 1963.

Respectfully submitted,

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No. 526

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

ADELL H. SHERBERT, *Appellant*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S.  
GALLOWAY, SR., AS MEMBERS OF SOUTH CARO-  
LINA EMPLOYMENT SECURITY COMMISSION AND  
SPARTAN MILLS, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

- I. The Conditioning of Unemployment Compensation to Ap-  
pellant upon Her Willingness to Work on Saturday  
Invalidly Coerces Her to Affirm Such Willingness Con-  
trary to her Religious Scruples.**

The appellees take as their basic proposition (Appellees  
Br., p. 13) the holding in *Braunfeld v. Brown*, 366 U.S. 599,  
603 (distinguishing *West Virginia Board of Education v.  
Barnette*, 319 U.S. 624):

“... the statute before us does not make criminal  
the holding of any religious belief or opinion, nor does

it force anyone to embrace any religious belief or to state or believe anything in conflict with his religious tenets.

However, the facts of the instant case cannot be forced into that mold (Appellees Br., pp. 10-14).

The appellees apparently concede that at least incidentally the unemployment compensation provisions here involved, as construed, subject claimant to economic inducement to make affirmation of willingness to violate the Sabbath by working (Appellees Br., p. 12).

But appellees urge that no constitutional right is affected because the statute as construed merely makes appellant's practice of her religious belief more expensive and involves no state-compelled disavowal of faith or belief (Appellees Br., p. 13). This in turn assumes that the burden imposed on practice of appellant's religion is indirect (Appellees Br., p. 11).

Of course, *Braunfeld v. Brown*, 366 U.S. 599, 607, does not hold that economic deprivation cannot constitute invalid impediment of the free exercise of religion. On the contrary it is specifically stated in that opinion (p. 607):

"If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect."

The burden on appellant's practice of religion in this case is direct. In the *Braunfeld* case this Court held the burden indirect because the economic penalty did not apply to all members of the Jewish Orthodox faith and the area of choice was not confined to the two alternatives of abandonment of the religious practice or the suffering of the economic penalty. *Braunfeld v. Brown*, 366 U.S. 599,

605-606. As Mr. Justice Brennan epitomized the distinction that made the burden indirect (id., 613 (dissenting opinion)):

"That is, the laws do not say that appellants must work on Saturday."

In contrast, here the South Carolina law, as construed, does say that appellant must be willing to work on Saturday. The penalty of withheld unemployment compensation applies universally and without exception to any Sabbatarian since the court below plainly holds that the test is "unrestricted availability for work" (R. 41) except on Sundays (R. 48). Under this statute the worker who believes his duty to God requires worship on the Saturday Sabbath has but the two alternatives: He must in repugnance to his religious belief affirm a willingness to work on Saturday and, if offered, accept a job requiring such work or forego the benefits of unemployment compensation.

It is unnecessary to determine whether appellant has an "absolute right" to unemployment benefits (Cf. Appellees Br., p. 12). Her coverage by the benefits is of dignity at least as great as the right or privilege of public employment<sup>1</sup> protected in *Wieman v. Updegraff*, 344 U.S. 183, 191-192, and *Slochower v. Board of Education*, 350 U.S. 551, 556-557.

Because the South Carolina law imposes a direct burden on the exercise of religion, i.e. penalizes the religious practice itself (as well as maintenance of the religious belief), it is not controlled by *Braunfeld v. Brown*, 366 U.S. 599, 606.

<sup>1</sup> As pointed out in *Friedman v. American Surety Co.*, 137 Tex. 149: "All employees who labor or perform services for employers who are covered by the Act labor or serve in part for the right to enjoy the benefits of the unemployment fund."



4

**II. "Available for Work" as here Construed and Applied to Require "Unrestricted" Availability on the Saturday Sabbath of Appellant Serves no Purpose Germane to the Unemployment Compensation Program of the State.**

The contentions of appellees under their Point II (Br., p. 14) cannot withstand scrutiny.

A. Appellees first seek further to foster the misleading inference created by the opinion of the state court (R. 42, 43, 44, 48) that it was a "change" by appellant of her "personal circumstances" i.e. her religion, that occasioned the discontinuance of her employment (Appellees Br. 15-16). Looking to the record to ascertain the existence of any rational basis for this characterization of the evidence (*In re Sawyer*, 360 U.S. 622, 628; *Wood v. Georgia*, 370 U.S. 375, 386) it is plain that appellant became a member of the Seventh-day Adventist church 22 months prior to the Spartan Mills changeover to required Saturday work (R. 11, 5). The dissenting opinion spells out the record showing no change by appellant occasioned her discharge. It states (R. 54):

"The appellant, in 1959, made no change in her religious faith which led to her discharge, nor did she attach any new condition to her stable employment of many years duration. The decision, the change, was made by the employer when it elected to no longer put a substitute in appellant's place on Saturdays, as it had done in the past. The only change or decision made by anyone at or near the time of appellant's separation from her employment was made by the employer and not by the employee. The employer simply elected not to continue to provide the particu-

lar employee the stable employment which had been provided for years.

See also R. 52 and R. 59.

B. The principal argument under appellee's Point II is addressed to the contention that any impairment of religious freedom by the statute, as construed and applied, is outweighed by dominant public interest (Appellees Br., pp. 16-20). But this is merely a general attempt to justify the uniform requirement that all claimants be available for Monday-through-Saturday work on the ground that textile mills work six days when business is good (Appellee Br., p. 17).

The appellees thus ignore the frequently repeated warning that in areas touching First Amendment freedoms the broad-ax approach is suspect and precision of regulation is essential. *NAACP v. Button*, 31 U.S. L. Week 4063, 4069 (U.S., Jan. 14, 1963) and cases there cited.

In detail, the appellees' argument ranges widely:

(1) The decision below is sought to be sustained on the theory that appellant was not "available for work" because the record fails to show an active and unrestrictive endeavor on her part to locate suitable employment (Appellee Br., p. 17). But this Court will not affirm by postulating a non-federal ground not relied on below. *Raley v. Ohio*, 360 U.S. 423, 441.

(2) Appellees suggest appellant "should have known that any upswing in the textile business cycle would result in mandatory Saturday employment" (Appellees Br., p. 17). No Saturday work had been required since World War II (R. 5). This hardly affords a basis upon which to charge appellant such knowledge and notice.

(3) The appellee next argues that to hold appellant "has not restricted her utility and desirability in the labor market (where all textile plants operate on a six-day basis)" frustrates the policy and purposes of the unemployment compensation law (Appellees Br., p. 17). Significantly, appellees do not contend that appellant's refusal to work on her Sabbath shows her unattached to the local labor market. Even as stated, the contention assumes, without support in the record, that textile plants offer the only jobs in the community. The contention also ignores the demonstrated existence of a labor market for those who, like appellant, entertain a religious belief in the Saturday Sabbath (R. 12). Furthermore, one who restricts her willingness to work to jobs requiring her highest skill would in some degree thereby restrict her market. Appellant is willing to take any "decent" job (R. 11).

(4) Appellees' argument is not advanced by assertion that appellant's refusal to work on the Sabbath is because of her religious belief and that practice of her religion is merely a "personal reason" (Appellees Br., 18-20). Freedom of religious belief and practice are also personal rights guaranteed by the First Amendment.

(5) Appellees (Br., p. 20-21) reargue the reasoning upon which the court below proceeded in construing the statutory requirement that in determining whether work is suitable for an individual the Commission shall consider the degree of risk involved to "his" morals (S.C. Code (1952) sec. 68-114(3); set out in Appellant's Brief, p. 4).

But appellant does not contest the state court's construction. The words of the South Carolina Supreme Court are the words of the statute. *Hebert v. Louisiana*, 272 U.S. 312, 317; *NAACP v. Button*, 31 U.S. L. Week 4063, 4067 (U.S. Jan. 14, 1963). We merely suggest (Ap-

pellant Main Br., pp. 28-29) that a less rigid construction of the subsection, consonant with that found practical in other States, would probably eliminate the constitutional objections here raised.

(6) Appellee would justify the requirement of Monday through Saturday availability, with its disregard of the religious rights of the Sabbatarian, on the ground that to permit consideration of religious rights, such as those of claimant, would subject the unemployment compensation fund to fraudulent claims (Appellees Br., p. 22).

Substantially the same contention was made and rejected as insufficient to justify the impairment of the constitutional freedoms in *Schneider v. State*, 308 U.S. 147, 164 ("Frauds may be denounced as offenses and punished by law."); *Cantwell v. Connecticut*, 310 U.S. 296, 306 ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."); *Martin v. Struthers*, 319 U.S. 141, 148.

Appellee fails to suggest any reason worthy of being balanced against the interests of the individual, the State and the United States in protecting her freedom of belief and freedom to practice her religion.

That there exists no such controlling reason is demonstrated by the almost universal recognition in most of the other United States (almost all of which have substantially identical laws) that refusal, because of religious or conscientious belief, to accept work on the Saturday Sabbath does not render the claimant ineligible or disqualified for unemployment compensation.<sup>2</sup>

<sup>2</sup> See cases collected in Appendix.

### **III. The Sunday Laws read into the Unemployment Compensation Law to grant Exemption from Willingness to Work on Sunday are Based Solely on Religious Considerations.**

Appellees' argument under their Point III (Appellees Br., 23-31) fails to meet appellant's contention that the Sunday laws, upon which the state court relied in holding willingness to work on Sunday not required (R. 48), make the unemployment law, as so construed, arbitrary and discriminatory in violation of the due process clause. As pointed out in our main brief (pp. 29-31) the same sections cited by the court provided an exception so as to permit Government contractors to operate on Sundays during emergencies but further provide that employees cannot be required to work on Sunday "who are conscientiously opposed to Sunday work".

The South Carolina Unemployment Compensation Law, is thus held not to require Sunday work because of the provisions of S.C. Code (1952), secs. 64-4, 64-5. But each of these, by its exception requiring the excusing of workers who are "conscientiously opposed to Sunday work", makes it manifest that the Sunday statutes, as so read into the unemployment compensation statute, are based on religious considerations and discriminate invidiously between religions since no similar exception is granted to those "conscientiously opposed to work on their Sabbath".

There is nothing in the record to support appellees' contention that appellant merely seeks a five-day week. Appellant is not unwilling to work on Sunday (R. 10, 11). Until 1962, violations of the general prohibition against worldly labor on Sunday were subject to a fine of only one dollar. S.C. Code (1952), sec. 64-2 (embodying without substantial



change the "act" of the Lord Proprietors ratified December 11, 1691. *Mullis v. Celanese Corporation of America*, 254 380 (S.C. 1959)). In fact, many enterprises are now specifically excepted from the general prohibition against worldly labor on Sunday. Cf. S.C. Code (1962), sec. 64-2-1, added in 1962, 52 Stat. L. p. 2134.<sup>3</sup>

Even if, as appellees contend (Appellees Br. 239), the discrimination between religious groups may be regarded here as attacked only under the equal protection clause (cf. R. 33, 49), it is clear that the latter clause permits no classification based on religion or race. *Fowler v. Rhode Island*, 345 U.S. 67, 69; *Niemotko v. Maryland*, 340 U.S. 268, 272; *Missouri ex rel Gaines v. Canada*, 305 U.S. 337, 345, 351; *Brown v. Board of Education*, 347 U.S. 483, 495.

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<sup>3</sup> In any event, it is significant that the Supreme Court of South Carolina forbore to rely on section 64-2 penalizing anyone "who shall do or exercise any worldly labor, business or work of his ordinary calling upon Sunday". Instead, it read into the unemployment compensation law (R. 48) the prohibition against employers permitting work on Sundays in textile plants or work by women in mercantile or manufacturing establishments on Sunday (S.C. Code (1962), secs. 64-4 and 64-5) (Appellant's Br., pp. 34-36) that contain the exception recognizing conscientious objection to work on Sundays.



### **Conclusion**

The requirement of unrestricted willingness to work on Saturday, as read into the South Carolina Unemployment Compensation Act and as applied here unreasonably and unwarrantedly impairs her freedom of belief and freedom to practice her religion. There has been suggested no consideration that reasonably may be regarded as a compelling reason for countenancing the invasion of appellant's right of religious freedom, so direct and oppressive as substantially to nullify appellant's religious freedom. The judgment below should be reversed.

Respectfully submitted,

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April, 1963.

## APPENDIX

State supreme court decisions have held unwillingness to accept work on Saturday not to render the applicant ineligible (*Swenson v. Michigan Employment Security Commission*, 340 Mich. 430 (1954); *In re Miller*, 243 N.C. 509 (1956)) or disqualified (*Tary v. Board of Review*, 161 Ohio St. 251 (1954)).

Other decisions of lower state courts and administrative bodies are set out below.

### ARIZONA

Ariz. A, No. 4473

Ben. Ser. Serv. U. I. AA-90-33 (May 9, 1956)

Held, that the first moral obligation of a person is to remain true to his religious convictions. Job requiring work between sundown Friday and sundown Saturday is unsuitable for claimant and refusal does not disqualify.

### ALABAMA

App. Bd. Dec. No. 5330, June 6, 1956

1 CCH Unempl. Ins. Rep. ¶ 8210

Refusal of worker to accept job on Saturday or Sunday where based solely on her religious belief is not a refusal of suitable work requiring disqualification. Relying on *Swenson v. Michigan Unemployment Compensation Commission*, 340 Mich. 430; *Tary v. Board of Review*, 161 Ohio St. 251

## CALIFORNIA

Calif. No. R-889-8756-42 (May 8, 1942)

5 Ben. Ser. No. 10, p. 184

Refusal to work on Saturday for reasons of conscience does not constitute a refusal of suitable employment.

Calif. App. Bd. Ben. Dec. No. 5775

CCH Unempl. Ins. Rep. ¶ 1975.12

Seventh-day Adventist who quit work when her employer requested her to work on Saturday held to have left work under compelling circumstances amounting to good cause.

## COLORADO

Colorado A. No. RD-7545-54 (Sept. 7, 1954).

Ben. Ser. Serv. U. I. VL-90-13 (Sept. 7, 1954)

A Seventh-day Adventist who, after he became extremely interested in his religion, was unwilling to work a shift which occurred between sundown Friday and sundown Saturday and who at the foreman's suggestion quit when it was not possible to arrange his hours as he desired, held to have voluntarily quit work with good cause.

"The prevailing opinion, as evidenced by decisions here and in various States across the country, is that an individual who in good faith refuses or leaves employment on ethical or religious grounds has good cause for so doing. The Unemployment Compensation Benefit Series reports many such cases, a few of which are listed below: California 7543, D. C. 11372, Georgia 11931, Illinois 7381, Indiana 2197, Iowa 8017, Kentucky 9596, Maryland 11705, New York \*A-90-1, North Carolina 9007, Pennsylvania 13753, Tennessee 12796, Wisconsin 10154.

Colorado No. RD-8737-55 (Sept. 22, 1955)

Ben. Ser. Serv., U.I. MC-255,303-3 (Sept. 22, 1955)

Seventh-day Adventist claimant who had worked for employer for two years without being required to work on her Sabbath, her religious scruples being known to her employer at time of original hiring, was discharged when she refused to work on Saturday as requested. Held, refusal must be held not misconduct connected with her work but practice of her religious belief. Not subject to disqualification.

#### CONNECTICUT

Conn. No. 277-B-54

Ben. Ser. Serv. U. I. SW-90-17

A claimant who refused her former job (after lay-off for week of work) because she was not granted permission to take off two nights monthly so as to observe her Sabbath, in her new faith which began on Friday at sundown and ended on Saturday at sundown, held not to have refused suitable work when the job would have interfered with her religious belief in which she had demonstrated her sincerity by her willingness to work on Sunday and by attending classes so as to become an enrolled member of the sect, and was available for work when she did not unduly restrict her availability.

#### DELAWARE

Del. Comm. Dec. App. Dkt. No. 11332-A (Aug. 21, 1961)  
reversing Ref. Dec. App. Dkt. No. 11332 (June 13, 1961).  
CCH Unempl. In. Rep. ¶ 8121.07

The claimant was offered a job which involved work seven days a week for the period of time it was necessary to process certain perishable food products. The claimant refused the job, stating that she was available for work only six days a week and wished to go to church on Sunday.

Held, that the claimant did not refuse to accept an offer of work for which she was reasonably fitted. "It is the Commission's opinion that the Delaware law does not require a conscientious Sabbath observer to be available for work on the Sabbath in order to be eligible for benefits. . . . On the evidence presented before the Commission it is decided that the claimant is a conscientious Sabbath observer; her Sabbath is Sunday.

#### DISTRICT OF COLUMBIA

Dist. of Col. No. 11372-A, App. Ex'r No. 1859 (Sept. 18, 1946)

10 Ben. Ser. No. 4, p. 28 (Sept. 18, 1946)

3 CCH Unempl. Ins. Rep. ¶ 1965.57

Jewish kosher meatcutter held to have had good cause for refusing job involving Saturday work. Held, not disqualified.

"In a similar case this tribunal decided on June 19, 1941, that a claimant who had genuine religious scruples against working on Sunday, which was the Sabbath day according to her religious faith, was justified in refusing a referral to a job that required her to work on Sunday. (See Appeal No. 1188)."

Dist. of Col. No. 6765-A, App. Ex'r No. 1188 (July 19, 1941)

4 Ben. Ser. No. 12, p. 235

3 CCH Unempl. Ins. Rep. ¶ 1965

#### GEORGIA

Georgia A, 11931, App. Ref. No. 6325 (May 12, 1947)

10 Ben. Ser. No. 11, p. 20

3 CCH Unempl. Ins. Rep. p. 14,180, ¶ 1975.137

Textile worker on day shift, laid off after he refused to report on Saturday night for extra work which would have required him to continue into Sunday, who stated he had previously refused to work on Sunday because religiously opposed to such employment, although he

had performed Sunday work during the war emergency and who 6 weeks later applied for work with another employer, and while waiting to be hired, was unwilling to accept employment elsewhere, held not disqualified for leaving, when he had placed the employer on notice that he would not work on Sunday, except in emergencies, and when he had a record of 9 years of good service for this employer, but to be unavailable for work during the period he restricted himself to one employer.

#### IDAHO

Idaho A, No-12661 App. Ex'r No. UC-1481 (July 17, 1947)  
11 Ben. Ser. No. 8, p. 43

Radio operator held to have left employment but with good cause where station force was put on rotating basis and he resigned because it would require him to work on Saturdays contrary to religious belief. "Although the Idaho law does not specifically mention religious beliefs among the things which should be considered as constituting good cause, the legislature in passing the law no doubt was taking into consideration the fact that the Constitution of the United States, as well as that of the State of Idaho, guarantees to an individual the right to pursuit of his individual religious beliefs. To rule otherwise would be placing a restriction upon a claimant's right to exercise this freedom of worship."

#### ILLINOIS

Illinois R, 10325, No. 45-BRD-441 (July 26, 1945)  
9 Ben. Ser. No. 3, p. 45

Refusal of 48-hour week job because of desire to observe Saturday Sabbath is good cause for refusal of work and does not render claimant ineligible as not "available."



**HAWAII**

Hawaii Ref. Dec. No. R-713 (April 10, 1956)

CCH Unempl. Ins. Rep. ¶ 1950.10

Claimant who had left his last job because he lacked seniority as a bus driver adequate to enable him to adjust his shifts to meet the religious belief that Sabbath begins at sundown Friday night, was first held unavailable for work on the ground that the work week in the community was on a Monday to Saturday basis. The Referee, in holding the claimant able and available for work, found that claimant could meet a six-day work week starting Sunday and ending Friday evening.

**KANSAS**

10451—Kans. A, App. Ref. No. 1589 (Oct. 2, 1945)

9 Ben Ser. No. 4-5, p. 73

Adventist refused referral to Saturday work. Held, "In the instant case it is the considered opinion of the appeals referee that the Constitution of the State of Kansas guarantees to each individual the right of religious liberty, and the claimant is within her rights in refusing to accept work on Saturday since to do so would violate the principles of her religion."

Kans. Comm. Dec. No. AC-1460 (October 13, 1955)

4 CCH ¶ 1965.27

Claimant who refused recall to work that would require her to change from first shift to a multiple shift plan involving Friday evening work on some occasions, held not to have refused suitable work since such work would be risk to her morals.

**KENTUCKY**

9597—Ky. A, No. 5772 (Feb. 19, 1945)

8 Ben. Ser. 7, p. 70

Claimant who refused job referral involving a few hours on Sunday held not disqualified where his refusal

was based on religious grounds. Work held not suitable. "Freedom of worship is one of the cardinal rights preserved to an individual by our Constitution."

#### LOUISIANA

La. B. Bd. of Rev. Dec. No. 114-BR-50 (Sept. 12, 1950)  
Ben. Ser. Serv. U. I. AA-90-3

Claimant, a Seventh-day Adventist, as business of employer increased, was told she would have to work Saturdays or be replaced. Held, "This claimant was undoubtedly sincere in every word of testimony she gave, and the Board feels that in a case of this kind she should be able and available for work."

#### MAINE

Maine Comm. Dec. No. 40-CD-6 (March 5, 1940)  
5 CCH Unempl. Ins. Rep. ¶ 1965.10

Seventh-day Adventist was discharged by his employer because of his refusal to work on Saturday. Claimant was held eligible for benefits.

#### MARYLAND

11705—Maryland R. UCB Dec. No. 2625 (Jan. 16, 1947)  
10 Ben. Ser. No. 8, p. 60  
5 CCH Unempl. Ins. Rep. ¶ 1975.13

A claimant who left employment because of tenets of his church that forbade him to perform work on Saturday held to have left work voluntarily but for good cause and therefore not disqualified.

*Sisley v. Board of Appeals, Department of Employment Security*, Superior Ct., Baltimore City, Md. (July 16, 1962)

5 CCH Unempl. Ins. Rep. ¶ 8284.

Claimant who had worked in industry but most recently as drug store clerk and cashier, registered solely as a retail sales clerk, having left her employment because

the handling of alcoholic beverages violated the tenets of her church. She was unwilling to accept employment requiring Saturday work because of her religious belief. Held, not available for work within meaning of Maryland statute because eligibility provisions of section 4 of the Maryland statute may not be read to include "suitable," or the requirement that in determining suitability of work, the degree of risk to claimant's morals be considered (Art. 95A, § 6(d)(1)). Furthermore, her restriction of availability to the retail sales field, where 95% of employers require Saturday work, coupled with her refusal to handle alcoholic beverages, justified conclusion that claimant was not attached to the retail sales labor market.

#### MASSACHUSETTS

Mass. Bd. of Rev. Dec. No. 7724

5 CCH Unempl. Ins. Rep. ¶ 1950.111

Officer worker who limited her employability to 6 days a week, excluding Saturday, because of religious convictions against working on that day, is unavailable for work inasmuch as Saturday is within the normal working week.

Bd. of Rev. Dec. No. H-1519 (January 4, 1951)

5 CCH Unempl. Ins. Rep. ¶ 1975.641

Where employee failed to notify his employer or his union of his change of habits of religious living to that of Seventh-day Adventist so as to prevent his working on a day (Saturday) normally accepted as part of the work week, he is held to have left his job voluntarily.

Massachusetts A, No. H-15933 (Dec. 20, 1954)

Ben. Ser. Serv. U-I. AA-90-21

A claimant who, subsequent to his lay-off on October 26, stated that he was unwilling to work Saturdays because of strong religious convictions, but who on the following November 19 ceased to apply this limitation, held unavailable for work during the weeks ending

October 30 through November 20, but available thereafter.

Mass. Bd. of Rev. Dec. No. H-27103 (April 10, 1959)  
5 CCH Unempl. Ins. Rep. ¶ 8224.03.

Claimant who refused an offer of work because she would have to work on Saturday contrary to dictates of her religion, is held to have refused the offer of work with good cause. As to her availability, her classification as an assistant bookkeeper offers a reasonable opportunity for her to obtain work on a five-day week basis since many firms in the Boston area who hire assistant bookkeepers have a five-day work week. Claimant is entitled to benefits.

Mass. Bd. of Rev. Dec. No. H-27174 (April 10, 1959)  
5 CCH Unempl. Ins. Rep. ¶ 8224.03

Where claimant's prolonged unemployment was due to her failure to make an active search for work and also to her unwillingness to work on Saturday (because she is a Seventh-day Adventist) which is required in the occupations in which she has had experience, it is held that claim does not meet the availability requirement.

#### MICHIGAN

Michigan A, No. B59-4424 (Sept. 22, 1959)  
Ben. Ser. Serv. U. L. VL-90-25

Worker joined Seventh-day Adventist church and thereafter notified employer he could not work, for religious reasons, on the Saturday Sabbath. Held not discharged for misconduct connected with his work and entitled to benefits.

## MONTANA

Montana App. Trib. Dec. No. 658 (Aug. 21, 1950)  
6 CCH Unempl. Ins. Rep. ¶ 1950.27

Claimant had done laundry and chambermaid work. After she became Seventh-day Adventist she quit her laundry job because it could not arrange to let her off on Saturdays. She registered for work as a chambermaid but such jobs also required Saturday work. Held, "The fact that the claimant desires to observe Saturday as the Sabbath does not in itself render her unavailable for work, but inasmuch as the labor market wherein claimant resides does not by custom and usage permit a Saturday day-off to persons employed as chambermaids, the claimant has rendered herself unavailable for this particular work [apparently the only work for which she had made application]."

## NEBRASKA

11638—Nebr. R. App. Trib. No. 143, Vol. IX (Jan. 3, 1947)  
10 Ben Ser. No. 7, p. 72

Claimant who for religious reasons was unwilling to accept work on Saturday and set minimum wage at an amount higher than general starting wage for women without previous experience in sales and general factory jobs (she having been employed in a steel mill during the war). Held, ineligible for benefits because not available in that she did not make good faith attempt to locate work. "The claimant's restriction as to Saturday work is valid and cannot be held to be a disqualifying factor in a country where religious freedom exists."

Nebr. App. Trib. Dec. No. 65, Vol. XXV (June 12, 1959)  
6 CCH Unempl. Ins. Rep. ¶ 8123.09

Refusal of claimant to accept referral to grocery store job that required work on Sunday held a refusal with good cause since this would have required him to per-

form his regular duties on Sundays contrary to his religious beliefs. Claimant held available for work and eligible for benefits.

#### NEVADA

Nev. App. Ref. Dec. No. A-7809 (August 31, 1960)

Ben Ser. Serv. U. I. SW-90-31

6 CCH Unempl. Ins. Rep. ¶ 8093

Refusal of offered position in local store did not disqualify claimant where it would have required work on Sunday contrary to her religious convictions. But her narrowing of her field to retail selling and refusal to diversify her work search to other fields constituted an unreasonable and unnecessary availability restriction.

#### NEW JERSEY

New Jersey No. BR-5275

7 CCH Unempl. Ins. Rep. ¶ 1965.261

Refusal to consider Saturday work because of religious scruples by a claimant who had adhered to such principles did not constitute refusal of suitable work.

#### NEW YORK

10197—New York A, No. 537-114-45R (June 5, 1945)

9 Ben. Ser. No. 1, p. 68.

Refusal to work on Saturday Sabbath held not to make claimant unavailable for work. Claimant first filed for benefits from city in Georgia against New York as the liable state.

Referee refused to assume that in a metropolitan area in Georgia, there were no job opportunities for a 5-day work week or for a Sabbath observer such as claimant. Initial determination that claimant was not available for work overruled.



**OHIO**

*Ward v. Board of Review, State of Ohio, Bureau of Unemployment Compensation, Court of Common Pleas, Franklin County (Dec. 11, 1959)*

Ben. Ser. U. I. (1960) SW-90-27

Rejection of offer of work as night watchman and janitor because it involved Sunday work in violation of religious beliefs held not to disqualify claimant.

**OREGON**

Ore. Bd. of App. Doc. No. 62-AB-132 (June 8, 1962)

8 CCH Unempl. Ins. Rep. ¶ 8169.02

Claimant whose only work experience was that of grocery clerk and who was unwilling to accept work on the Saturday Sabbath held unavailable for work and not eligible for benefits.

**PENNSYLVANIA**

13563—Pennsylvania R, No. 44-99-G-2840 (Mar. 21, 1949)

12 Ben. Ser. No. 7

Jewish bookkeeper's refusal of proffered job because it required Saturday work, in violation of her religious principles, held a rejection for good cause; work was not suitable. Further, she was eligible because this limited restriction left her still attached to the Philadelphia labor market.

**TENNESSEE**

Tennessee B, Bd. of Rev., No. 54-BR-78 (Mar. 11, 1954)

Ben. Ser. Serv., U. I., AA-90-19

Observer of Saturday Sabbath, not Adventist, held "available for work" despite refusal of Saturday work for religious reasons. Restrict is found not serious enough to limit availability so as to remove him from the labor market.

Tennessee Bd. of Rev. Dec. No. 45-BR-64

9 CCH Unempl. Ins. Rep. ¶1950.101

Seventh-day Adventist who work when her employer changed from a five-day to a seven-day week on a super-priority Government contract and she was asked to work on Saturday, held available for work when her restriction did not remove her from the labor market, as she found employment. But found to have left without good cause considering the employer's critical circumstances.

#### VIRGINIA

11273—Virginia A, No. D-1397; AE-609 (Nov. 24, 1945)

10 Ben. Ser. No. 2, p. 147

Recent convert to Seventh-day Adventist church who quit her job because new religion forbade her working on Saturday was held to be "available for work" because Saturday work was not "suitable". There were some plants in the area that operated on a five-day week but she had been unable to locate a job.

Virginia Dec. No. S-8694-8525 (January 21, 1960)

10 CCH Unempl. Ins. Rep. ¶49,571

Seventh-day Adventist gave up Fuller Brush sales because he was unable to collect from his buyers. Filed claim because unable to get work. Held, he had good cause for quitting his self-employment and not subject to disqualification.

As to restriction due to his religious beliefs against working on his Sabbath, "it has been repeatedly held that a claimant's refusal to work on his Sabbath is not a restriction in itself that would justify the denial of unemployment compensation on the ground that he is not available for work. The restriction with regard to Saturday work would not take him out of the general labor market inasmuch as there are a large number of places where he could find work that would not inter-

ferred with his Sabbath day. However, . . . he has not shown a genuine attachment to the labor market by conducting an active and diligent search for work. He is, therefore, held not available for work during the period in question.

#### WASHINGTON

9107—Washington R. Comm'r No. 540 (Aug. 31, 1944)  
8 Ben Ser. No. 1, p. 140

Seventh-day Adventist who was unwilling to work on Saturday and had obtained work that did not require it, both before and after period subject of his claim, held to be available for work and not disqualified by her restriction against Saturday work.

Many firms will accommodate workers of this lady's religious beliefs and will adjust their schedule of hours to fit such requirements. "Freedom of religion is guaranteed under our constitution and any creed or church is entitled to one Sabbath day per week whether it be Sunday, Saturday, or some other day."

Washington B. Comm'r No. 3692 (October 26, 1955)  
Ben. Ser. Serv. U. I., AA-90-23

Seventh-day Adventist filling station worker held not to have adversely affected availability for work by restriction against Sabbath work. Individual willing to work on Saturday evening and Sunday is a distinct asset since most service station attendants desire that time off.

*Betts v. Giorine*, Superior Court, Kings County (April 12, 1957)

Washington Ct.

Ben. Ser. Serv. U. I., AA-90-35

10 CCH Unempl. Ins. Rep. ¶ 8276

Holding that charwoman was not available for work because of her restriction against work on the Seventh-day Adventist Sabbath, reversed. Unwillingness to

work on Friday nights and Saturdays was unwillingness to make herself available only as to work that was not suitable. Plaintiff was available for suitable work.

The freedom of religion guaranteed by the First and Fourteenth Amendments as well as the state constitution make unconstitutional any construction of the available for work provision of the state statute that would make ineligible, and deny benefits to, a claimant because of his unwillingness to accept employment requiring him to work on his Sabbath where such unwillingness is based on his individual and sincere belief in, and adherence to, a religious tenet of his church."

#### WISCONSIN

10154—Wis. A. App. Trib. No. 45-A-79 (June 1945)

10 CCH Unempl. Ins. Rep. ¶ 1965,812

8 Ben Ser. No. 12, p. 156.

Sweeper cleaner who refused jobs involving Sunday work because she would be unable to attend Sunday church services as she had been doing for a number of years, held to have refused suitable employment with good cause.

(6688-6)